89-1047

Supreme Court, U.S.
FILED
AUG 29 1989

No. _____

In The

Supreme Court of the United States

October Term, 1989

MAJOR F. BOGGERTY and ADEN BOGGERTY,

Petitioners,

vs.

EARNESTINE WILSON, JACKIE VEASLEY, CYNTHIA MARTIN, DAVID MURRAY and LT. WARREN COLEMAN,

Respondents,

and

THE CITY OF DETROIT,

Respondent.

PETITION FOR WRIT OF CERTIORARI

AND APPENDIX

Lawrence D. Hochman
Melvyn D. Saperstein
29800 Telegraph Road
Southfield, MI 48034
(313) 353-6500

QUESTION PRESENTED FOR REVIEW

SHOULD A WRIT OF CERTIORARI BE GRANTED WHERE THE MICHIGAN COURT OF APPEALS REVERSED A JURY VERDICT FOR PETITIONERS IN A 42 USC 1983 CASE, AS A MATTER OF LAW WHICH THE MICHIGAN SUPREME COURT REFUSED TO REVIEW, HOLDING THAT PETITIONERS PRESENTED INSUFFICIENT EVIDENCE THAT RESPONDENT CITY OF DETROIT, BY CUSTOM AND POLICY, FAILED TO PROPERLY TRAIN ITS POLICE OFFICERS WHERE THE EVIDENCE SHOWED, BY EXPERT TESTIMONY, INTER ALIA, SPECIFIC FAILURE TO TRAIN IN MANAGEMENT OF INTOXICATED PERSONS, SPECIFIC FAILURE TO TRAIN POLICE "DOORMEN" AND FAILURE TO GIVE POST-ACADEMY IN-SERVICE TRAINING, AND WHERE THERE WAS AN EXPLICIT FINDING IN A SPECIAL VERDICT FORM OF DELIBERATE INDIFFERENCE, IN CONFLICT WITH MONELL AS MOST RECENTLY INTERPRETED IN CITY OF CANTON, OHIO; AND WHERE THE MICHIGAN COURT OF APPEALS FURTHER FOUND THAT EVEN IF PETITIONERS HAD PROVED A FAILURE TO PROPERLY TRAIN, THERE

WAS NO AFFIRMATIVE LINK BETWEEN SAID FAILURE AND THE CONSTITUTIONAL DEPRIVATION, WHERE THE JURY EXPLICITLY FOUND PROXIMATE CAUSE AND THE EVIDENCE SHOWED, BY EXPERT TESTIMONY, THAT THE OFFICERS WERE NOT PROPERLY TRAINED TO DO THE SPECIFIC JOBS THEY WERE PERFORMING AND THAT THOSE SPECIFIC FAILURES TO TRAIN CAUSED THE INJURIES?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Authorities	v
Opinion Below	1
Grounds of Jurisdiction I. Course of Proceedings II. Statutory Provisions Conferring Jurisdiction	2
Statutory Provision Which the Case Involves	3
Statement of the Case	4
Reason for Allowance of the Writ	10
Appendixes:	
Appendix A - Opinion-Michigan Court of Appeals	A-1
Appendix B - Order-Michigan Supreme Court, February 22, 1988	B-1
Appendix C - Order-Michigan Supreme Court, denying reconsideration, May 31, 1989	C-1
Appendix D - Special Verdict Form	D-1

Appendix E - Excerpts from
Transcript of Expert
Erik Beckman E-1

Appendix F - Excerpts from
Transcript of Expert
Frank Donley F-1

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Bergquist v County of Cochise, 806 F2d 1364 (CA9, 1986)..... 42

City of Canton, Ohio v Harris, ___ US ___, 109 S Ct 1197, 103 L Ed 2d 412 (1989)..... i, 10, 12, 22, 24, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36

Daniels v Williams, ___ US ___; 106 S Ct 662; 88 L Ed 2d 662 (1986)..... 41

Davidson v Cannon, ___ US ___; 106 S Ct 668; 88 L Ed 2d 677 (1986)..... 41

Hamilton v Rogers, 791 F2d 439 (CA5, 1985)..... 41

Jones v City of Chicago, 787 F2d 200 (CA 7, 1986)..... 41

Oklahoma City v Tuttle, 481 US 808, 105 S Ct 2427, 85 L Ed 2d 791 (1985)..... 28

Revere v Massachusetts General Hospital, 463 U.S. 239, 243-245, 103 S.Ct. 2979, 2982-2983, 77 L.Ed.2d 605 (1983)..... 23

Rymer v Davis, 754 F2d 198 (CA 6, 1984) vacated and remanded 473 US 901; 105 S Ct 3518, 87 L Ed 2d 646 (1985) reinstated 775 F2d 756 (CA 6, 1985)..... 30, 31

Federal Statutes

28 USC 1257 (a)..... 2

42 USC Section 1983..... i, 3, 4, 10, 11, 29

State Cases

Ford v American National Insurance Company, 46 Mich App 368, 208 NW2d 226 (1973)..... 20

Napier v Jacobs, 145 Mich App 285, 291, 377 NW2d 879 (1985)..... 20

No. _____

In The

Supreme Court of the United States

MAJOR F. BOGGERTY and ADEN BOGGERTY,

Petitioners,

vs.

EARNESTINE WILSON, JACKIE VEASLEY, CYNTHIA MARTIN, DAVID MURRAY and LT. WARREN COLEMAN,

Respondents,

and

THE CITY OF DETROIT,

Respondent.

OPINION BELOW

The opinion of the Michigan Court of Appeals is not reported and is attached as Appendix A.

GROUNDS OF JURISDICTION

I. COURSE OF PROCEEDINGS

The judgment of the Michigan Court of Appeals was issued on June 2, 1987.

Petitioners' timely Motion for Leave to Appeal to the Michigan Supreme Court was denied on February 22, 1988.

Petitioner's timely motion for reconsideration was denied on May 31, 1989.

II. Statutory Provision Conferring Jurisdiction

This Petition is filed within the allowable ninety (90) day period and this Court's jursidiction is invoked under 28 USC 1257 (a).

STATUTORY PROVISION WHICH THE CASE INVOLVES

42 USC Section 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioners in this cause were Major and Aden Boggerty. They commenced a civil action against the City of Detroit and the above-named individual Detroit Police Officers under the Federal Civil Rights Act, 42 USC 1983, for violation of constitutional rights.

On October 24, 1979, Major Boggerty was the driver of an automobile parked in front of his borther's house in the City of Detroit. Police officers Earnestine Wilson, Jackie Veasley, and Cynthia Martin had been called to the scene regarding a criminal complaint against Petitioner's brother, Robert Boggerty.

The officers asked the occupants of Petitioner's car for Robert Boggerty; he identified himself and he was arrested. Major Boggerty questioned the validity of this proceeding and was, himself, arrested by Earnestine Wilson. Both brothers were taken to the 11th Precinct station.

The basis for Petitioner's arrest remains in doubt and no warrant was ever obtained for his detention.

Petitioner was placed in a cell by Respondent Officer David Murray, the doorman. After one hour Petitioner was allowed by Murray to leave the cell to make a phone call. After the call Petitioner was asked by Murray to sign a sheet of paper, pay one hundred dollars, and be allowed to leave. At this point Petitioner's brother, in an adjoining cell began to curse Officer Murray and, in response Petitioner claims, Murray kneed Petitioner in the groin, knocked him down and repeatedly kicked him. While Petitioner was on his back three other officers held him spread eagle and beat him. A white officer appeared at the door as the assault continued.

Eventually Boggerty was placed on a bench in the fingerprint room and EMS was called. Petitioner refused their offer to take him to Detroit Receiving Hospital and, since no other aid

was offered, Petitioner's wife, Aden, and a friend transported him to Sinai Hospital near Petitioner's home.

Major Boggerty suffered a fracture of the tip of his femur and, after two unsuccessful operations to repair the fracture, he ultimately received a total hip replacement. Bedridden for six months, he was eventually totally disabled from his occupation as a boiler mechanic for the Detroit school system. Aden Boggerty was co-plaintiff upon a claim of loss of consortium.

Petitioners presented numerous trial witnesses. The individual defendants (except Murray, who did not appear) were called as adverse witnesses. Expert witnesses attested to Major Boggerty's injuries. Additionally, Petitioners called two experts to testify to the training given by Respondent City to the individual officers and to the standard of training generally.

Frank Donley, the Supervisor for Facility

Inspections for the Michigan Department of Corrections, testified that the training for personnel working in detention areas in Detroit jails failed to meet applicable professional standards.

Dr. Erik Beckman, professor of Criminal Justice at Michigan State University and a former police officer, testified that the training provided by the City of Detroit to police officers is, and had been for the last ten years, inadequate. Specifically Earnestine Wilson, David Murray and Lieutenant Warren Coleman were not properly trained for their jobs. Dr. Beckman conceded that the City may possess a good theoretical training program, but avered that they have not implemented that program and have not provided any post-Police Academy in-service training.

This cause was submitted to the jury upon a special verdict form. The seventh question on that

form asked:

> Do you find that the City of Detroit failed to train its police force, or trained it in a reckless or grossly negligent manner, or was deliberately indifferent to training required, so that future police misconduct was almost inevitable, or do you find that there was a policy, custom, ordinance or procedure which violated Major Boggerty's constitutional rights?

The jury answered "yes" to this question and "yes" to the next question on proximate cause. The jury then awarded actual damages of $550,000.00 to Major Boggerty and compensatory damages of $50,000.00 to Aden Boggerty.[1]

Respondent City of Detroit filed a motion for a judgment notwithstanding the verdict. On December 21, 1984, Judge Foley denied that motion.

Respondent City of Detroit appealed the verdict to the Michigan Court of Appeals; Petitioners cross-appealed. On June 2, 1987, the

---

[1]The jury absolved the individual Defendants of personal liability under either negligence or intentional tort theories.

court of appeals reversed the judgment against the City of Detroit; that court also affirmed the judgment of no cause for action in favor of David Murray. Judge Hood dissented in both holdings.

Petitioners timely filed a motion for rehearing. On June 24, 1987, the court of appeals denied rehearing. Judge Hood voted to grant the motion.

Petitioners filed a motion for leave to appeal to the Michigan Supreme Court citing three questions of error. Leave was denied on February 22, 1988. Petitioners filed a motion for reconsideration which was denied on May 31, 1989.

Petitioners now file this Petition focusing on one question of error.

REASON FOR ALLOWANCE OF THE WRIT

THE HIGHEST STATE COURT IN MICHIGAN HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY WHICH IS IN CONFLICT WITH APPLICABLE DECISIONS OF THE UNITED STATES SUPREME COURT.

A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE MICHIGAN COURT OF APPEALS REVERSED A JURY VERDICT FOR PETITIONERS IN A 42 USC 1983 CASE, AS A MATTER OF LAW WHICH THE MICHIGAN SUPREME COURT REFUSED TO REVIEW, HOLDING THAT PETITIONERS PRESENTED INSUFFICIENT EVIDENCE THAT RESPONDENT CITY OF DETROIT, BY CUSTOM AND POLICY, FAILED TO PROPERLY TRAIN ITS POLICE OFFICERS WHERE THE EVIDENCE SHOWED, BY EXPERT TESTIMONY, INTER ALIA, SPECIFIC FAILURE TO TRAIN IN MANAGEMENT OF INTOXICATED PERSONS, SPECIFIC FAILURE TO TRAIN POLICE "DOORMEN" AND FAILURE TO GIVE POST-ACADEMY IN-SERVICE TRAINING, AND WHERE THERE WAS AN EXPLICIT FINDING IN A SPECIAL VERDICT FORM OF DELIBERATE INDIFFERENCE, IN CONFLICT WITH MONELL AS MOST RECENTLY INTERPRETED IN CITY OF CANTON, OHIO.

THE MICHIGAN COURT OF APPEALS FURTHER FOUND THAT EVEN IF PETITIONERS HAD PROVED A FAILURE TO PROPERLY TRAIN, THERE WAS NO AFFIRMATIVE LINK BETWEEN SAID FAILURE AND THE CONSTITUTIONAL DEPRIVATION, WHERE THE JURY EXPLICITLY FOUND PROXIMATE CUASE AND THE EVIDENCE SHOWED, BY EXPERT TESTIMONY, THAT THE OFFICERS WERE NOT PROPERLY TRAINED TO DO THE SPECIFIC JOBS THEY WERE PERFORMING AND THAT THOSE SPECIFIC FAILURES TO TRAIN CAUSED THE INJURIES.

The highest State Court in Michigan has decided an important question of federal law in a

way which is in conflict with applicable decisions of the United States Supreme Court.

A Wayne County Circuit Court jury, in a special verdict form, explicitly found Respondent City of Detroit liable to Petitioners in the amount of $600,000 ($50,000 of it for loss of consortium by Petitioner Major Boggerty's wife, Aden Boggerty) for a deliberately indifferent failure to properly train its police officers as a matter of custom and policy, pursuant to 42 USC 1983.

In the face of abundant and uncontradicted evidence of such failure to train, the Michigan Court of Appeals, in a 2-1 decision, held that Petitoner Major Boggerty presented insufficient evidence to sustain the verdict. The Michigan Court of Appeals further found that even if Petitioner had proved a failure to properly train, there was no affirmative link between the failure to properly train and the constitutional deprivation, in the face of an explicit finding of

proximate cause by the jury supported by evidence.

The Michigan Supreme Court denied leave to appeal and further denied a motion for reconsideration.

The State Courts decided (and refused to review) the question of "failure to train" in conflict with, inter alia, City of Canton, Ohio v Harris, _____ US _____, 109 S Ct 1197, 103 L Ed 2d 412 (1989) since the "deliberate indifference" test was clearly met and the jury explicitly so found.

Following are some of the salient points of testimony by Petitioners two expert witnesses, excerpted from the transcripts of their trial testimony (Appendices E and F):

Dr. Beckman testified as to the Certification of the Detroit Police Academy:

> Q. I have forgotten the question. Isn't it true, Dr. Beckman, that irrespective of what standards you are talking about of the International Association of Chiefs of Police, that at all times between 1970 and 1977, the

Police Academy for the City of Detroit was in fact certified to train police officers in the State of Michigan?

A. It never lost its certification.

Q. That is my question. I don't want you to jargon on. I am asking you whether there was ever a period of time between 1970 and 1979, that the Police Academy was not certified by this agency?

A. It never went that far, but there was a threat of loss of certification.

Q. I am not talking about threats. Did the Council ever say: "You are not qualified to instruct police officers in the State of Michigan", "yes" or "no"?

A. Yes, that was said to the Detroit Police Academy.

Q. And was the certification taken away?

A. It never went that far.

Q. When was that, sir?

A. In the 1970's. (T 55)

Dr. Erik Beckman further testified as to the deficiency as far as training was concerned for

Officers Earnestine Wilson, David Murray and Lt. Warren Coleman. With respect to Earnestine Wilson Dr. Beckman testified that:

> "She was not given that training which is required, according to National Standards after the police academy, and those standards require continuous in-service training at a minimum, 40 hours a year, although that would generally be conceived as not enough, but that is an established minimum; it would not be very good. So that each police officer received refresher training as well as training in new and additional material throughout his or her police career, from the date of graduation until their retirement and Officer Wilson did not receive such training." (T 37-38)

Dr. Beckman also cited Officer Wilson's deposition in which she described the training program as a hurried-up training program. (T 35)

Regarding Patrolman David Murray the doorman, Dr. Beckman stated that "there was no special training for that particular assignment". (T 39) He went on to state that this does not meet the

national standards with respect to the training of a doorman. He further stated

> "the national standards indicate that each police officer must be trained on a regular basis after leaving the police academy, in the normal duties performed by that police officer. It has to include certain basic things as well, but it has to be job-related." (T 39)

Dr. Beckman then opined that Patrolman Murray was not properly trained as a doorman. (T 40)

Judge Hood in his dissent reiterated Dr. Beckman's statement that according to "National Standards":

> "The individual jailer or Doorman must have training in the care and safety of prisoners to detect degrees of intoxication, degrees of a person possibly under the influence of drugs, a person who might be depressed and/or suicidal. A person in need of medical attention, all of which require note-taking and classification of that prisoner, and in some cases, action upon those findings." (T 42)

Regarding whether Lt. Coleman was adequately trained to be a shift commander at the precinct level Dr. Beckman stated that Lt. Coleman's training was deficient by "the lack of annual in-service continous training that is job related". (T 44)

When asked about the training being provided by the Detroit Police Department Dr. Beckman testified that "the training method used by the Detroit Police Department, between the years 1970 and 1979, did not comport to national standards and never have. (T 45)

Mr. Frank Donley also testified that in his opinion Officer Murray was not properly trained. This was based on Officer Murray's deposition about his training in which Officer Murray stated that he received no training as a doorman and that he had not been trained to carry out the doorman function. Officer Murray further stated that he was not aware of any training programs. (T 43)

When asked as to his professional opinion as to whether the City of Detroit has a history of properly training its doorman Mr. Donley replied, "They have not been properly trained." This was based on the deposition testimony of Inspector Jackson. (T 60) Mr. Donley, when asked "Is it your professional opinion there should be an on-going training program for all doormen for the City of Detroit," he responded "Yes". (T 77) To the question "Is it your professional opinion that an on-going training program should be going on on a continuing basis?" he again responded "Yes". (T 77)

Based on the Lieutenant's deposition testimony and the deposition testimony of doorman Murray Mr. Donley stated that in his opinion they were not trained for the duties they were performing. (T 79)

Mr. Donley testified that if Officer Murray had been properly trained a visibly intoxicated prisoner would not be removed from his cell to make

a phone call. The reasoning was that a person could fight or stumble and fall and cause an injury. When a person is locked in a cell not much harm can be done to anyone. (T 46)

Mr. Donley also stated that whether Petitioner was drunk or sober the training was not adequate:

> Q. You testified that the lieutenant and the Doorman, in your opinion, their training was not appropriate?
>
> A. Yes.
>
> Q. Is your testimony that you don't have to conclude whether or not this gentleman was intoxicated, to arrive at that conclusion?
>
> A. That's correct.
>
> Q. It doesn't matter to you one way or the other?
>
> A. It does not.
>
> Q. You are saying, that whether he was drunk or if he wasn't drunk, if he was sober, they weren't appropriately trained to handle him?
>
> A. That is correct.
>
> Q. So you are saying this training wasn't adequate, right across the board?

A. Yes. (T 99-100)

The above is but a sample of the relevant testimony by the experts. Additional dispositive testimony will be cited below as applicable.

Petitioners' suit under this statute alleged, and proved, that the City of Detroit, as a matter of custom and policy, failed to properly train the individual defendant police officers and this failure to train was the proximate cause of Major Boggerty's serious physical injuries. The special verdict form (Appendix D) was clear and unequivocal in presenting that issue to the jury as Question Seven. The jury then found that the training was improper and was the proximate cause of the injury. Boggerty and his wife were awarded damages. A motion for judgment nothwithstanding the verdict was denied.

The Michigan Court of Appeals, nevertheless, reversed the judgment on the basis that the Petitioners' evidence was not sufficient to sustain

the verdict.

Both the majority and dissenting opinions in the Michigan Court of Appeals recognized that a verdict will not be upset unless the evidence is insufficient as a matter of law. Further, the appellate court must view the evidence in the light most favorable to Petitioners and give them the benefit of every reasonable inference that can be drawn from the evidence. See Napier v Jacobs, 145 Mich App 285, 291, 377 NW2d 879 (1985).

The majority opinion, however, after paying lip-service to the above standards, concluded that the evidence was insufficient directly in the face of clear evidence which, at the very least, would have allowed reasonable minds to differ on this question. In doing so the majority ignored the pertinent factual evidence and misapplied the relevant law.

In Ford v American National Insurance Company, 46 Mich App 368, 208 NW2d 226 (1973), the court

held that a reviewing court may not reverse the finding of a jury unless reasonable minds could not disagree; a jury's verdict is entitled to an even higher degree of appellate respect than a trial judge's factual findings, and where the trial judge has reviewed the verdict and approved it, appellate review is even more limited. Id. at 372.

Petitioners' proofs presented clear and convincing evidence that the City was deliberately indifferent in its training practices for police officers. Even if one puts aside the particular and peculiar facts surrounding Major Boggerty's arrest, detention, and handling, the conclusion is still inescapable that there was a proper question for jury consideration. Even if we forget that the arresting officers could never agree on what charge Petitioner was arrested; forget that if Petitioner was sober he should not have been arrested and if drunk should not have been removed from his cell; forget that no reasonable police explanation exists

for Petitioner's injuries; even fogetting all this, the jury was still given other convincing testimony upon which to base liability.

The Special Verdict form given to the jury, Question 7, was as follows:

> SECTION 1983 (City of Detroit): Do you find that the City of Detroit failed to train its police force, or trained it in a reckless or grossly negligent manner, or was deliberately indifferent to training required, so that future police misconduct was almost inevitable, or do you find that there was a policy, custom, ordinance or procedure which violated Plaintiff MAJOR BOGGERTY'S constitutional rights?
>
> YES___X_____ NO_____
>
> If the answer to the above was YES, then determine whether this was a proximate cause to Plaintiff MAJOR BOGGERTY'S injuries. If the answer to the above is NO, then go on to Question No. 8.
>
> Was the City's liability above the proximate cause of Plaintiff MAJOR BOGGERTY'S injuries?
>
> YES___X_____ NO_____

(Emphasis added)

The Supreme Court in City of Canton, Ohio v

Harris, _____ US _____, 109 S Ct 1197, 1204, 103 L Ed 2d 412 (1989) held:

> We hold today that the inadequacy of police training may serve as the basis for Section 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.[8] (Emphasis added)

Footnote 8 states:

> 8. The "deliberate indifference" standard we adopt for Section 1983 "failure to train" claims does not turn upon the degree of fault (if any) that a plaintiff must show to make out an underlying claim of a constitutional violation. For example, this Court has never determined what degree of culpability must be shown before the particular constitutional deprivation asserted in this case - a denial of the due process right to medical care while in detention - is established. Indeed, in Revere v. Massachusetts General Hospital, 463 U.S. 239, 243-245, 103 S.Ct. 2979, 2982-2983, 77 L.Ed.2d 605 (1983), we reserved decision on the question of whether something less than Eighth Amendment's "deliberate indifference" test may be applicable in claims by detainees asserting violations of their due process right to medical care while in custody. . . .

> Second, the proper standard for determining when a municipality will be liable under Section 1983 for constitutional wrongs does not turn on any underlying culpability test that determine when such wrongs have occurred.

(Emphasis added)

Under exactly the standard this Court has now set - the "deliberate indifference" standard - the jury, under an explicit instruction to that effect, found Respondent, City of Detroit, liable to Petitioners. Petitioners had to, and did, overcome this more stringent hurdle even before this Court established it. It is, therefore, unconscionable for Petitioners to have had their jury verdict taken away.

The Court in City of Canton, supra at 1205, perceptively further held:

> It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen that in light of the duties assigned to specific officers or employees the

> need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.[10] In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.[11]

(Emphasis added)

Footnote 10 states:

> It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policy makers, who, nevertheless, are "deliberately indifferent" to the need.

(Emphasis added)

The example focused on by this Honorable Court is exactly the situation in the instant case. Petitioners' expert, Dr. Beckman, testified as follows to the need for further training after the police academy and the absence thereof (T 37-38, Appendix E):

Q. In what ways, Doctor, was Earnestine Wilson deficient as far as training was concerned?

A. She was not given that training which was required, according to National Standards after the Police Academy, and those standards require continuous in-service training at a minimum, 40 hours a year, although that would generally be conceived as not enough, but that is an established minimum; it would not be very good. So that each police officer received refresher training as well as training in new and additional material throughout his or her police career, from the date of graduation until their retirement and Officer Wilson did not receive such training.

(Emphasis added)

City of Canton further noted, at 1205-1206:

> In resolving the issue of a city's liability, the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform.

Dr. Beckman, as shown above, gave expert testimony on just that relation. He testified that the individual officers, Murray (as doorman), Wilson (as arresting officer) and Coleman (as officer in charge of the precinct) were not properly trained

to do the specific jobs they were doing, which led to Petitioner's injury.

That testimony, moreover, establishes the "affirmative link" or, as the jury specifically found, the proximate cause. (See also p. 31, infra)

It is noted that in the part concurrence and part dissent of Justice O'Connor, City of Canton, 109 S Ct at 1209, she took the majority to task stating that "the diagnosis of mental illness is not one of the 'usual and recurring situations with which [the police] must deal'." The issue of diagnosing insobriety, however - one of the issues in the instant case - is, indeed, the paradigm of a usual and recurring police situation.

Justice O'Connor also took issue with the majority's decision to let the Court of Appeals decide, on remand, whether to allow the case to proceed under the "deliberate indifference" rule. Justice O'Connor stated, supra at 1210, "Allowing

an inadequate training claim such as this one to go to the jury based upon a single incident would only invite jury nullification of Monell," (emphasis added) and went on to cite Oklahoma City v Tuttle, 481 US 808, 105 S Ct 2427, 85 L Ed 2d 791 (1985). Nevertheless, even though City of Canton was based on but a single incident, the majority did allow for the possibility of the case going to a jury.

In Oklahoma City v Tuttle, 105 S Ct at 2436 the Court held:

> Proof of a single incident of unconstitutional activity is not sufficient to impose liability under Monell, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker.

(Emphasis added)

Footnote 7 states, however:

> We express no opinion on whether a policy that itself is not unconstitutional, such as the general "inadequate training" alleged here, can ever meet the "policy" requirement of Monell. . .

This Court in City of Canton, supra, 109 S Ct at 1203, reaffirmed that the issue is still left unresolved. Further at 1203-1204:

> The claim in this case, however, is that if a concededly valid policy is unconstitutionally applied by a municipal employee, the city is liable if the employee has not been adequately trained and the constitutional wrong has been caused by that failure to train. For reasons explained below, we conclude, as have all the Courts of Appeals that have addressed this issue,[6] that there are limited circumstances in which an allegation of a "failure to train" can be the basis for liability under Section 1983. Thus, we reject petitioner's contention that only unconstitutional policies are actionable under the statute.

(Emphasis added)

Thus, whatever the langugage in Tuttle, this Court in City of Canton established:

(1) that a policy need not be unconstitutional to be actionable under 42 USC 1983

(2) that inadequate training, if based on deliberate indifference, can sustain an action based on a single incident.

Note that in City of Canton, 109 S Ct at 1201, the jury's verdict did not state the basis on which it had ruled for Mrs. Harris, thus allowing the impermissible possibility that the verdict was based on mere respondeat superior. Not so in the instant case. The "deliberate indifference" rule was specified in the Special Verdict form.

In Rymer v Davis, 754 F2d 198 (CA 6, 1984) vacated and remanded 473 US 901; 105 S Ct 3518, 87 L Ed 2d 646 (1985), reinstated 775 F2d 756 (CA 6, 1985), the Sixth Circuit wrote, 775 F2d at 757:

> In the instant case, the jury was instructed:
>
> If you find for the plaintiff with regard to his claim of excessive force, then you will consider the claim of excessive force, then you will consider the claim made by him against the City of Shepherdsville; and if you find from the preponderance of the evidence that the City of Shepherdsville trained its police officers in a way that was so reckless or grossly negligent that future police misconduct was almost inevitable or would be properly characterized as substantially certain to result, then you shall

> find for the plaintiff against the City of Shepherdsville.
>
> Thus, the City of Shepherdsville was found liable based upon a finding by the jury that the City of Shepherdsville inadequately trained its police officers. No inference from a single incident of excessive force was involved. Consequently, the City was not held liable because it "hired" 'one bad apple,' " id. at 2435, but because the City was itself a bad actor in failing to train its police force. Consequently, Tuttle is not controlling, rather, this case presents the exact issue upon which the Court refused to express an opinion. See id. 2436 N. 7.

(Emphasis added). On that instruction (and the evidence adduced at trial) the Court of Appeals let the jury verdict stand. This Court in City of Canton, supra, 109 S Ct at 1201 cited Rymer without disapproval. It is essential to note that the jury instruction in the instant case contained every element of the Rymer instruction plus the "deliberate indifference" language now required by City of Canton.

In Rymer, 754 F2d at 201, FN 1, the Court held

that "the type or amount of training necessary to avoid the inference of a custom that authorizes or condones police misconduct is properly a jury question." Well, in the instant case, the jury decided that question and found enough evidence to bring in a verdict for Petitioners. It is unconscionable and reversible error to take that verdict away.

As to the "affirmative link" between the custom and/or policy and the constitutional deprivation, the jury found proximate cause, based on evidence. An affirmative link can be imputed, but there is a direct link in the instant case.

Dr. Beckman testified (T 81, Appendix E):

> Q. . . .What training do you understand the police didn't receive that would have prevented them from doing that? [to knee Major Boggerty in his groin]
>
> A. Training in the use of force, the limitations of the law regarding use of force.

That is evidence of a "direct causal link" which is

the first inquiry in a case alleging municipal liability under 42 USC 1983. City of Canton, 109 S Ct at 1203. As this Court admits, "the inquiry is a difficult one," id at 1203.

Further, in City of Canton, 109 S Ct at 1206, this Court held:

> Moreover, for liability to attach in this circumstance the identified deficiency in a city's training program must be closely related to the ultimate injury. Thus in the case at hand, respondent must still prove that the deficiency in training actually caused the police officers' indifference to her medical needs.[12] Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect? Predicting how a hypothetically well-trained officer would have acted under the circumstances may not be an easy task for the fact-finder, particularly since matters of judgment may be involved, and since officers who are well trained are not free from error and perhaps might react very much like the untrained officer in similar circumstances. But judge and jury, doing their respective jobs, will be adequate to the task.

(Emphasis added). If the jury does not have an easy task, all the more its decision should be

respected. The jury was adequate to its task. The judge was adequate to his task, giving an impeccable instruction and denying judgment notwithstanding the verdict.

Unfathomably, the Michigan Court of Appeals majority found that the "affirmative link is missing", after conceding that said link can be "actual or imputed." (Opinion, P. 7 & 8. Appendix A). The Court majority also said, at P. 8:

> Further, the quantum of evidence needed to establish the "affirmative link" is considerably greater where, as here, the particular custom that plaintiffs claim resulted in their injuries involves a course of municipal inaction that is a good deal removed from the constitutional deprivation alleged.

That requiring of a greater quantum of evidence is in conflict with this Court in City of Canton, 109 S Ct at 1204, FN 8, holding that municipal liability does not turn on any underlying culpability test. Further, the allusion to municipal action "a good deal removed" is

inapplicable to the facts of this case. The majority cited Tuttle, supra, with no specific page cite. The Tuttle example, 105 S Ct at 2436, is:

> Obviously, if one retreats far enough from a constitutional violation some municipal "policy" can be identified behind almost any such harm inflicted by a municipal official; for example, Rotramel would never have killed Tuttle if Oklahoma City did not have a "policy" of establishing a police force.

That is certainly not the kind of remote "but for" situation in the instant case. Moreover, that example was given in the context of the preceding sentence, at 2436:

> And in the second place, some limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in Monell will become a dead letter.

As shown above, City of Canton established that a policy need not be unconstitutional to be actionable under 42 USC 1983.

The Michigan Court of Appeals majority also

held (Opinion, P. 8, Appendix A):

> Plaintiffs presented no evidence of similar incidents at other precinct lockups.

The majority footnoted to Tuttle. As shown above, City of Canton, and Tuttle itself, established that a single incident can impose liability if the proof of the single incident includes proof that it was caused by an existing custom or policy, whether it be constitutional or unconstitutional.

The dissent by Judge Hood, in the 2-1 Michigan Court of Appeals decision, would have been held as follows:

> As indicated by its special verdict, the jury in the instant case accepted plaintiff's theory that defendant had a custom or policy of inadequately training its officers in the care and custody of intoxicated persons.
>
> In support of this theory, plaintiffs introduced the testimony of two expert witnesses. Dr. Beckman stated that according to "National Standards" a doorman must have training in the care and safety of prisoners to detect degrees of intoxication or drugs. Based upon his review of Murray's deposition, Beckman concluded that

Murray had had no special training for his position as doorman and accordingly, that Murray had not been properly trained. In addition, Beckman opined that neither Lieutenant Coleman nor Officer Wilson had been properly trained. Finally, when questioned on the overall training provided by the City of Detroit between the years 1970 and 1979, Beckman responded that the training methods "did not and never have" met the National Standards.

Dr. Donley concurred in Beckman's assessments. Like Beckman, Donley testified that Murray had not been properly trained as a doorman. . . Donley explained that a visibly intoxicated prisoner should not be removed from his cell to make a phone call for a number of reasons:

> "Well, there is a number of reasons. A person could fight. When he is in the cell, locked in a cell, it is very unlikely -- not much harm can be done to anybody. If he is taken out of the cell and his contact with an officer or people out in the lobby area, he can cause quite -- if a person is in fact intoxicated, stumble and fall and cause an injury."

In addition, Lieutenant Coleman

testified that letting plaintiff, an allegedly intoxicated prisoner, out of his cell to make a phone call was consistent with procedures in effect at the precinct.

When this testimony is viewed in a light most favorable to the plaintiffs and plaintiffs are given the benefit of every reasonable inference which can be drawn from the evidence, I conclude that sufficient evidence was presented to establish that the City either had a policy of failing to train its doormen or that the training provided was so grossly negligent that it amounted to "deliberate indifference". Furthermore, Donley's testimony establishes that the lack of adequate training was likely to cause the very danger which befell plaintiff. Because the doorman was inadequately trained, he permitted a visibly intoxicated person to leave his cell thereby rendering it likely that an injury would occur. Accordingly, the jury could infer that by failing to train its doormen, the City exhibited a deliberate indifference to the resulting violation. That there was testimony that the city met state standards is not dispositive if those standard are themselves inadequate.

The City contends that municipal policy could never be established absent deliberate action by a designated municipal policymaker. While concedely, Justice Rehnquist, in a footnote to Tuttle raises the question, he also

specifically refused to address it. See 85 L Ed 2d 804, fn 7. And the actual holding of Tuttle is far more limited. Tuttle stands for the proposition that an isolated incident of police mis-conduct can never establish municipal liability. Since plaintiffs' allegations of municipal policy are supported by more than the single incident complained of, Tuttle does not bar recovery in the instant action. Moreover, in light of the expert testimony regarding the City's training program, the jury could infer that the absence of adequate training or the failure to routinely implement adequate training was a conscious decision by the City's policymakers.

Unlike the situation in Tuttle, plaintiffs here presented evidence of a city-wide lack of adequate training, or at least, a grossly negligent training program. The jury's decision was not based on the single, isolated incident but rather on the City's overall failure to provide adequate training as testified to by Beckman and Donley. The expert testimony was sufficient to establish a municipal policy upon which to render the City liable. . .

Unlike the majority, I would hold that plaintiffs did establish an "affirmative link" between the City policy and the constitutional deprivation. Tuttle, 105 S Ct 2436. Both experts testified that proper training would have alerted a doorman to the dangers inherent in caring for intoxicated prisoners.

> Moreover, Donley specifically stated that one of the dangers attendant upon letting an intoxicated person out of his cell was that the prisoner might stumble and fall and injure himself. Accordingly, the complete failure to train the doorman made the risk of personal injury highly likely and the City's failure to train could be viewed as the "moving force" of the violation, i.e. the injury. I would affirm.

(emphasis added)

Petitioners submit that Judge Hood recognized the issues correctly and properly applied the law to the facts elicited.

Donley and Beckman were qualified expert witnesses who obviously helped convince the jury that the Respondent City of Detroit invited liability by refusing to properly train its police officers. In stark contrast, the City presented no evidence whatsoever to refute the Petitioners' position.

How is it possible then for the Court of Appeals majority to view this evidence most favorably to Petitioners, give every reasonable

inference to Petitioners, and still overturn the verdict of the jury and reverse the trial court for sustaining that verdict?

The majority opinion cites a considerable body of law to support its position, but the cases are inapplicable to the case at bar. The Court of Appeals majority relies on Daniels v Williams, ____US____; 106 S Ct 662; 88 L Ed 2d 662 (1986) and Davidson v Cannon, ____ US ____; 106 S Ct 668; 88 L Ed 2d 677 (1986). Both of these United States Supreme Court decisions are based on the premise that negligent conduct of municipal employees does not establish a policy or custom so as to make a city liable under Section 1983. No such "negligence" claim is involved here. The same is true of the cases cited in the various circuit courts of appeal (Hamilton v Rogers, 791 F2d 439 (CA 5, 1985); Jones v City of Chicago, 787 F2d 200 (CA 7, 1986)).

When the question before appeallate courts has

been whether proper police training brought about the injury, as opposed to the negligence of the officer, then it has almost universally been held to be a jury question. See Bergquist v County of Cochise, 806 F2d 1364 (CA 9, 1986) and cases cited therein at 1370.

The Michigan Court of Appeals majority, in an opinion which is recommended for publication, has adopted a standard for civil rights claims in this state at variance with the standards set by the United States Supreme Court. The majority also ignored the palpable existence of sufficient evidence of deliberately indifferent failure to properly train and of the affirmative link between said failure and the constitutional deprivation.

Petitioners submit that their Petition for Writ of Certiorai should be granted.

Lawrence D. Hochman
LAWRENCE D. HOCHMAN

FRIED, SAPERSTEIN, DeVINE
& KOHN, P.C.

BY: _____
MELVYN D. SAPERSTEIN

89-1047

Supreme Court, U.S.
FILED
AUG 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1989

MAJOR F. BOGGERTY and ADEN BOGGERTY,

Petitioners,

vs.

CARNESTINE WILSON, JACKIE VEASLEY, CYNTHIA MARTIN, DAVID MURRAY and LT. WARREN COLEMAN,

Respondents,

and

THE CITY OF DETROIT,

Respondent.

APPENDIX A THROUGH D

Lawrence D. Hochman
Melvyn D. Saperstein
29800 Telegraph Road
Southfield, MI 48034
(313) 353-6500

APPENDICES

* * *

APPENDIX A

OPINION

STATE OF MICHIGAN

COURT OF APPEALS

MAJOR F. BOGGERTY and
ADEN BOGGERTY,

Plaintiffs-Appellees
and Cross-Appellants,

-v- No. 82510

EARNESTINE WILSON, JACKIE VEASLEY, CYNTHIA MARTIN, DAVID MURRAY and LT. WARREN COLEMAN, June 2, 1987

Defendants-Cross-
Appellees,

and

THE CITY OF DETROIT,

Defendant-Appellant.

BEFORE: H. Hood, P.J., J. H. Gillis, and J. M.

Batzer*, JJ. J. M. Batzer, J.

Following a jury trial, defendant City of Detroit was found liable under 42 USC 1983, for violating the constitional rights of plaintiff Major Boggerty (hereafter "plaintiff"). The City appeals as of right.

Plaintiffs have cross-appealed the judgment of no cause of action in favor of the individual defendants, police officers for the City of Detroit.

I

The instant action arises out of the arrest of plaintiff in the City of Detroit on October 24, 1979. Plaintiff was arrested at the time of the arrest of his brother, Robert, a felonious assault suspect and passenger in plaintiff's car. Plaintiff testified that the officers informed him at the time of Robert's arrest that they would have to take him down to the police station. He testified that there were three unopened fifths of

liquor in the rear passenger area of his car.

Plaintiff was taken by two policemen to the 11th Precinct. Once at the station, plaintiff's belongings were removed and his watchband was broken in the process. According to plaintiff, he was functioning normally during the booking procedure. After plaintiff's belongings were removed, he was taken by an officer to a door where he was met by Officer David Murray. Murray escorted plaintiff to a cell where plaintiff remained for approximately one hour.

Plaintiff testified that he repeatedly requested to be let out of his cell to make a phone call but that Murray at first ignored his requests. After several minutes, Murray responded and took plaintiff from his cell to a phone in the fingerprint room. Plaintiff called the home of his friend, James Carreker, and informed Carreker's wife of his arrest. After the phone call, plaintiff was taken to a table and fingerprinted.

According to plaintiff, after he wiped his hands, he was approached by Murray and given a blank sheet of paper. Plaintiff testified that Murray told him, "You sign this sheet of paper and pay $100 and you can go." Plaintiff heard his brother, Robert, detained in a precinct cell, yell to Murray to "Bring your red ass in here if you want to fight." Murray then allegedly grabbed plaintiff by his shirt collar and kneed him in the upper left side of his leg, near his groin.

According to plaintiff, he fell to the floor and Murray continued kicking him in the lower back. Three police officers joined Murray and grabbed plaintiff "spread eagle" on the floor. The officers hit plaintiff a few more times in the abdominal area. Because his leg had been previously broken and he did not want to reinjure it, plaintiff appealed to a black officer to stop the beating, but the officer responded, "If your leg is broken, you should have a cast on it." When

plaintiff looked up, he saw a white officer standing in the doorway. The officers stopped assaulting plaintiff and ordered him onto a bench. He remained on the bench until his wife and a friend, James Carreker, arrived. Plaintiff's wife paid plaintiff's bond and with the help of Carreker drove plaintiff to Sinai Hospital. Although a Detroit EMS unit had been called to transport plaintiff to Detroit Receiving Hospital for medical attention, plaintiff refused to go because Sinai was closer to his home. Plaintiff testified that sometime after the incident, he learned that his wife poured him a tumbler full of whiskey which he drank in the car on the way to the hospital. Plaintiff remained in the hospital until December 24, 1979. He continues to suffer pain in his left hip and leg.

Plaintiff's wife, James Carreker and Ruth Gray Chambers corroborated plaintiff's account of events occurring before and after plaintiff's arrest and

subsequent injury at the station.

A conflicting account of events was presented by the Detroit Police Officers. The Detroit Police received a report at approximately 4:00 p.m., of a felonious asssault. A woman at the location of the alleged assault described the assailants as driving a blue car and heading in a northerly direction. Defendant Wilson and her partner left the scene in search of the car but were unable to locate it and returned to the scene of the crime. As they were speaking with other officers back at the scene of the assault, a blue car turned onto that street and stopped about mid-block. The woman identified the car and Wilson approached plaintiff who was the driver.

According to Wilson, plaintiff was holding a small plastic cup, which she assumed contained alcohol. She asked plaintiff to step out of the vehicle. She also saw a fifth of Canadian Club sitting along side of plaintiff. She recalled that

plaintiff was reluctant to comply and started "mumbling and cussing." After Robert Boggerty was arrested, Wilson placed plaintiff under arrest for having open alcohol in his car and disturbing the peace. Wilson accompanied plaintiff to the station where, pursuant to Lt. Warren Coleman's directions, the charge was changed to driving under the influence of liquor. Plaintiff refused a breathalyzer test. Wilson testified that the DUIL charges were eventually dropped due to insufficient evidence. The charges regarding plaintiff's failure to take a breathalyzer test were dropped upon a referee's finding that the reason for plaintiff's arrest was belligerence.

Plaintiff called Lt. Warren Coleman as an adverse witness. Coleman testified that he thought plaintiff was "quite intoxicated" when he was brought to the station. Coleman believed that it was proper to let plaintiff out of his cell to make a call assuming that the doorman, Murray, thought

plaintiff was capable of making the call. Coleman testified that on the date of the offense, Murray was acting as doorman at the precinct. Coleman did not see the injury but entered the fingerprinting room within seconds after hearing the sound of someone or something falling. When he entered, he saw plaintiff and Murray lying on the floor. He denied that he saw anyone assault plaintiff.

Two physicians, McCollough and Pollak, testified concerning plaintiff's injuries. Both testified that plaintiff suffered a fractured femur and that it was unusual for a man of plaintiff's age to have sustained such a fracture as the result of a fall because the injury generally required a higher degree of external force. Pollak read an excerpt from the emergency room admissions records indicating that it was difficult to examine plaintiff because he was intoxicated with alcohol.

Plaintiffs additionally introduced the testimony of two experts in the area of hiring and

training police officers. Both experts testified on the basis of standards published by various criminal justice associations.

Dr. Beckman testified that based upon his review of Murray's deposition, Murray had had no special training for his position as doorman and accordingly had not been properly trained. He also opined that neither Lt. Coleman nor Officer Wilson had been properly trained. When questioned on the overall training of doormen provided by the City of Detroit between the years 1970 and 1979, Beckman responded that the training methods "did not and never have" met the standards on which he relied. Beckman acknowledged on cross-examination that Detroit Police officers go through all state mandated training and that the training by the City of Detroit met all state standards.

Dr. Donley concurred in Beckman's assessments. Like Beckman, Donley testified that Murray had not been properly trained as a doorman. Donley

asserted that in 1978 to 1979, the City of Detroit had a "well written program" for training doormen, but that the program had not been effectively carried out. Finally, Donley explained that a visibly intoxicated prisoner should not be removed from his cell to make a phone call for a number of reasons, including injury to the intoxicated person. Instead, an intoxicated person should be permitted his phone call prior to being taken to his cell.

Plaintiff's case as submitted to the jury on a special verdict form charged the individual defendants, variously, with false imprisonment, assault and battery, negligence, and denial of plaintiff's civil rights. The case against defendant City of Detroit was premised on the City's denial of plaintiff's civil rights by improper training, or by a "policy, custom or procedure" which violated plaintiff's civil rights. The jury rendered a verdict of no cause of action

as to the individual defendants on all counts and rendered a verdict against the City in the amount of $550,000 for denial of plaintiff's civil rights.

We first address defendant-appellant's claim of error.

II

Defendant City of Detroit claims that plaintiffs presented insufficient evidence of a denial of civil rights to sustain the jury verdict.

In reviewing the City's claim, this Court must view the evidence in a light most favorable to plaintiffs and give plaintiffs the benefit of every reasonable inference that could be drawn from the evidence. If after viewing the evidence in this manner, reasonable men could differ, the question was properly left to the jury. Napier v Jacobs, 145 Mich App 285, 290-291; 377 NW2d 879 (1985).

The special verdict makes clear that the jury premised the City's liability on the City's failure to properly train its doormen and the resultant

negligent removal of plaintiff from his cell. When we view the evidence in a light most favorable to plaintiffs, we conclude that plaintiffs presented insufficient evidence to sustain this verdict.

A plaintiff may establish municipal liability for deprivations of a federal constitutionally protected interest if he can show the existence of a policy or custom and a sufficient causal link between the policy or custom and the constitutional deprivation. Monell v Dep't of Social Services, 436 US 658; 98 S Ct 2018; 56 L Ed 2d 611 (1978). Monell's proscription of vicarious liability on a respondeat superior theory makes plain that the "'policy or custom' requirement * * * was intended to prevent the imposition of municipal liability under circumstances where no wrong could be ascribed to municipal decisionmakers." City of Oklahoma City v Tuttle, ____ US ____; 105 S Ct 2427, 2435; 85 L Ed 2d 791 (1985) (plurality opinion); Id., 105 S Ct at 2438-2439 (BRENNAN, J.,

concurring).

Additionally, it now appears that in §1983 actions the plaintiff has to present proof of fault beyond mere negligence on the part of the City in establishing the policy or tolerating the custom. See Daniels v Williams, ____ US ____; 106 S Ct 662; 88 L Ed 2d 662 (1986) (prison official's negligent conduct causing unintended loss of or injury to life, liberty or property does not constitute a violation of the Due Process Clause of the Fourteenth Amendment); Davidson v Cannon, ____ US ____; 106 S Ct 668; 88 L Ed 2d 677 (1986) (same).

Plaintiffs clearly presented no facts that tended to show conduct implementing or executing a policy statement, ordinance, regulation, or decision officially adopted and promulgated by the City. Monell v Dep't of Social Services, 436 US at 690; 98 S Ct at 2035-2036. In fact, Donley testified that the City had a well-written program for training doomen.

However, governmental customs, in contrast to official policies, do not receive "formal approval through * * * [the local government's] official decisionmaking channels." Monell, 436 US at 690-691; 98 S Ct at 2036. Rather, they are simply "'persistent and widespread * * * practices of * * * officials.'" Id., at 691; 98 S Ct at 2036.

Even if there were testimony of certain practices of officers at the 11th Precinct from which it could reasonably be inferred that there existed a custom of training standards that failed to meet published standards and which were not in accord with the City's own program, such a "custom" does not, in itself, establish a prima facie case. There must be an "affirmative link" between the custom at issue (especially where, as here, the "custom" itself does not establish wrongdoing) and the constitutional deprivation alleged to cast blame on the City. Tuttle, 105 S Ct 2436. Federal circuit courts have taken Tuttle's "affirmative

link" requirement to mean that there must be some knowledge or an awareness, actual or imputed, of the custom's consequences showing the municipality's approval, acquiescence, or encouragement of the unconstitutional violation. Hamilton v Rogers, 791 F2d 439 (CA 5, 1985); Jones v City of Chicago, 787 F2d 200 (CA 7, 1986); see Hays v Jefferson County, Kentucky, 668 F2d 869, 873-874 (CA 6, 1982), cert den 459 US 833; 103 S Ct 75; 74 L Ed 2d 73 (1982).

Further, the quantum of evidence needed to establish the "affirmative link" is considerably greater where, as here, the particular custom that plaintiffs claim resulted in their injuries involves a course of municipal inaction that is a good deal removed from the constitutional deprivation alleged. Oklahoma City v Tuttle, supra; Napier v Jacobs, 145 Mich App 285, 298; 377 NW2d 879 (1985). We find that the Tuttle affirmative link is missing in the instant case.

In the case sub judice, plaintiffs' own expert testified that the training of Detroit police officers met all state standards. Plaintiffs presented no evidence that the standards their experts relied on were accepted generally by municipal departments or were of such a nature that the failure to live up to them was substantially likely to result in injury. Plaintiffs presented no evidence of similar incidents at other precinct lockups. [1] The City's mere failure to measure up to published training standards thought by plaintiffs' expert to be superior to the standards of Michigan law and its failure to follow through on its own written standards does not make a prima facie case. Plaintiffs' evidence when viewed most expansively can establish no more than negligence on the City's part. Such a quantum of fault is insufficient.

In Daniels v Williams, supra, the plaintiff sought damages in a §1983 action for injuries

allegedly sustained while a jail inmate when he slipped on a pillow left on the jail stairs by a guard. In affirming summary judgment for the defendant, the U.S. Supreme Court stated:

"Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liabiltiy for injuries that attend living together in society."

* * *

"That injuries inflicted by governmental negligence are not addressed by the United States Constitution is not to say that they may not raise significant legal concerns and lead to the creation of protectible legal interests. The enactment of tort claim statutes, for example, reflects the view that injuries caused by such negligence should generally be redressed. It is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns." [footnote omitted.] 88 L Ed 2d 669

Having found that plaintiffs presented insufficient evidence to recover for violation of plaintiff's constitutional rights, we find it unnecessary to address defendant-appellant's remaining claims of error. We move to plaintiffs'

claim on cross-appeal.

III

Plaintiffs contend that the trial court erred by refusing to permit plaintiffs to make objections during trial to the video deposition of plaintiffs' witness, Dr. Mitchell Pollak. Plaintiffs sought to object to Pollak reading from his discharge summary a statement that plaintiff was admitted after being involved in an altercation in which he tripped on his leg and fell down.

Plaintiff's objection came too late. The applicable court rule, GCR 1963, 315.6(2) [now MCR 2.315(F)], provided that objections are waived unless a party presents the deposition, along with his objections to the trial court, ten days before trial. We reject plaintiffs' argument that the availability of a written transcript negates the waiver, which was couched in mandatory terms in the court rule. The availablility of the written transcript has little or no effect in avoiding the

delay caused by objections to a video deposition at or near the time of trial. Sponenburgh v Wayne County, 106 Mich App 628; 308 NW2d 589 (1981), relied upon by plaintiffs, is inapposite. Moreover, as in Sponenburgh, reversal is not required here since plaintiffs were not denied a fair trial by admission of the testimony, which supported at least one of plaintiffs' alternative theories of liability against the City.

IV

Plaintiffs complain that they were reversibly prejudiced when defense counsel commented on, and cross-examined plaintiff concerning the factual inconsistencies between his various pleadings, amendments thereof, and his trial testimony. In a similar vein, plaintiffs allege that they are entitled to a new trial because defense counsel for the individual defendants improperly commented on the history of the pleadings, noting the number of amendments and the addition of claims.

With regard to the former contention, "counsel should be afforded a summational free rein in comparing" pleadings and testimony before the trier of fact. Vachon v Todorovich, 356 Mich 182, 187; 97 NW2d 122 (1959). Such a rule discourages deceptive pleading and "its observance affords a time-tried and altogether valuable means of getting at the truth when facts are disputed." Id., pp 187-188. See also Beals v Walker, 98 Mich App 214; 296 NW2d 828 (1980), rev'd on other grounds, 416 Mich 469; 331 NW2d 700 (1982).

However, we believe that comment on the mere fact of amendment of pleadings is distinguishable. The rules provide for liberal pleading and amendment. As such, we believe that comment on such practice, aside from the evidentiary facts involved, is improper. However, in the instant case, those comments were isolated, and as such, innocuous. We decline to reverse.

V

Plaintiffs assert two errors relating to their claim that the individual defendants Coleman and Murray were negligent in their care of plaintiff, a prisoner in a local lockup.

First, plaintiffs argue that they were entitled to present evidence of, and entitled to a jury instruction on, Department of Corrections rules and regulations, promulgated pursuant to MCL 791.262; MSA 23.22, dealing with the supervision and administration of local penal institutions. Specifically, plaintiffs wished to present expert testimony relating application of the administrative rules to the conduct of the individual defendants and an instruction that violation of the rules was evidence of negligence. The court denied these requests below on the grounds that violation of the administrative rules had not been properly pled.

Violation of administrative rules and

regulations are evidence of negligence, and as such, when a violation is properly pled, the violation is properly submitted for jury determination. Beals v Walker, 416 Mich 469, 481; 331 NW2d 700 (1982). Plaintiffs alleged in their complaint that the individual defendants had a "duty to know and follow administrative regulations."

We believe that violation of the rules was properly pled and that the trial court erred in ruling to the contrary. However, we believe admission of evidence regarding these violations would have been otherwise denied, and as such we decline to reverse. Queen Ins Co v Hammond, 374 Mich 655, 658-659; 132 NW2d 792 (1965). Before evidence of a violation of an administrative rule or regulation is admitted at trial, the trial court must consider whether the harm suffered was what the regulation was designed to prevent. Beals v Walker, p 482. The regulations presented by

plaintiffs at trial dealt with specifications for detoxification cells, holding cells, and segregations cells. These rules deal with the safety of prisoners within the various cells. They serve to protect prisoners from assault within the cells. They are not intended to prevent injuries to persons in other areas of a local lockup building. [2]

Plaintiffs contend that the trial court erred by refusing to permit their expert witness Donley to offer an opinion on whether defendant Murray had acted properly in his handling of plaintiff. In each instance in which the opinions were sought, defense counsel objected that the questions embraced the ultimate issue of fact. The trial court sustained the objection of defense counsel, reasoning that the opinions were beyond the areas of the expert's expertise. We agree with the trial court.

Donley was qualified as an expert in the area

of police hiring and training. As such, we find no abuse of discretion in the court's exclusion of his opinion testimony concerning whether individual police officers breached their standard of care.

VI

Finally, plaintiffs claim that the absence of defendant David Murray from trial entitled them to a default judgment, GCR 1963, 506.6(2), or at least, entitled them to an instruction that Murray's absence permitted the jury an inference that his testimony would have been adverse to defendants' cause, SJI2d 6.01. Plaintiffs premised their request for default on the alleged previous oral command of Judge Dunn, at an April, 1984 hearing, that Murray appear at trial.[3] The trial court denied both the default judgment and plaintiff's request for SJI2d 6.01 on the ground that the record contained no written order compelling Murray's presence at trial.

Courts speak through their written orders, not

their oral statements. Hosner v Brown, 40 Mich App 515; 199 NW2d 295 (1972). The record contains no written order of the trial court, GCR 1963, 506.1, or subpoena[4], GCR 1963, 506.4, compelling Murray's presence. Accordingly, we agree with the trial court that neither the default sanctions of GCR 1963, 506.6(2) nor the jury instruction, SJI2d 6.01, has application here. Cavanaugh v Cardamone, 147 Mich App 159; 383 NW2d 601 (1985). See also Kaniewski v Emmerson, 44 Mich App 737, 738-739; 205 NW2d 812 (1973).

The trial court's judgment in favor of plaintiffs against the City of Detroit is REVERSED. The trial court's judgment of no cause of action against the individual defendants is AFFIRMED.

/s/ John H. Gillis
/s/ James M. Batzer

FOOTNOTES

[1] In appropriate circumstances, a single decision by a municipal policymaker may result in municipal liability under s1983. Pembaur v Cincinnati, ____ US ____; 106 S Ct ____; 89 L Ed 2d 452 (1986).

[2] We note that subsequent to Young v City of Ann Arbor, 119 Mich App 512; 326 NW2d 547 (1982), remanded on other grounds, 422 Mich 900 (1985), subsequent history at Young v City of Ann Arbor, 147 Mich App 333, 335; 382 NW2d 785 (1985), in which this Court held that Department of Corrections rules dealing with "local jails" included city and county jails, as well as local lockups, the Lesiglature amended MCL 791.262; MSA 23.22 to specifically limit Department of Corrections administrative regulations to jails under the jurisdiction of the county sheriffs.

[3] The stenographer's notes from that hearing were never located.

[4] In a post-trial motion for default judgment below and on appeal, plaintiffs present a subpoena served on counsel for the individual defendants compelling Murray's attendance on January 9, 1984, a trial date some six months prior to the actual trial of this matter. That subpoena is not a part of the lower court record. More importantly, absent a record of service for the ultimate June trial date, we decline to given this non-record order credence.

STATE OF MICHIGAN

COURT OF APPEALS

MAJOR F. BOGGERTY and
ADEN BOGGERTY,

Plaintiffs-Appellees
and Cross-Appellants,

v No. 82510

EARNESTINE WILSON, JACKIE
VEASLEY, CYNTHIA MARTIN,
DAVID MURRAY and LT. WARREN
COLEMAN,

Defendants-Cross-
Appellees,

and

THE CITY OF DETROIT,

Defendant-Appellant.
_____/

BEFORE: H. Hood, P.J., J.H. Gillis and J.M. Batzer*, JJ.

H. Hood, P. J. Dissenting in part.

I must respectfully dissent from those portions of the majority decision which vacate the jury's verdict and which approve the trial court's

ruling as to the absence of defendant David Murray.

First, I cannot agree with the majority's conclusion that plaintiff's evidence was insufficient to support a jury verdict.

In Napier v Jacobs, 145 Mich App 285, 290-291; 377 NW2d 879 (1985), this Court stated that the standard for review of a sufficiency of the evidence claim in a civil case is comparable to the standard used in ruling on a motion for judgment notwithstanding the verdict:

"A judgment notwithstanding the verdict on defendants' motion is appropriate only if the evidence is insufficient as a matter of law to support a judgment for plaintiff. Basic Food Industries Inc v Grant, 107 Mich App 685, 695; 310 NW2d 26 (1981). In reaching a decision, the trial court must view the evidence in the light most favorable to the plaintiff and give the plaintiff the benefit of every reasonable inference that could be drawn from the evidence. Isom v Farrugia, 63 Mich App 351, 354-355; 234 NW2d 520 (1975). If after viewing the evidence in this manner reasonable men could differ, the question is one for the jury and judgment notwithstanding the verdict is improper. Id." Drummey v Henry, 115 Mich App 107, 111; 320 NW2d 309 (1982), lv den, 417 Mich 895 (1983).

"As explained in Killen v Benton, 1 Mich App 294, 298; 136 NW2d 29 (1965), a 'judgment

notwithstanding the verdict may be allowed only if there is insufficient evidence as a matter of law to make an issue for the jury.'"

As indicated by its special verdict, the jury in the instant case accepted plaintiff's theory that defendant had a custom or policy of inadequately training its officers in the care and custody of intoxicated persons.

In support of this theory, plaintiffs introduced the testimony of two expert witnesses. Dr. Beckman stated that according to "National Standards" a doorman must have training in the care and safety of prisoners to detect degrees of intoxication or drugs. Based upon his review of Murray's deposition, Beckman concluded that Murray had had no special training for his position as doorman and accordingly, that Murray had not been properly trained. In addition, Beckman opined that neither Lieutenant Coleman nor Officer Wilson had been properly trained. Finally, when questioned on the overall training provided by the City of

Detroit between the years 1970 and 1979, Beckman responded that the training methods "did not and never have" met the National Standards.

Dr. Donley concurred in Beckman's assessments. Like Beckman, Donley tstified that Murray had not been properly trained as a doorman. Unlike Beckman, however, Donley asserted that in 1978 and 1979, the City of Detroit had a "well written program" for training doormen, but that the program had not been effectively carried out. Finally, Donley explained that a visibly intoxicated prisoner should not be removed from his cell to make a phone call for a number of reasons:

"A Well, there is a number of reasons. A person could fight. When he is in the cell, locked in a cell it is very unlikely -- not much harm can be done to anybody. If he is taken out of the cell and his contact with an officer or people out in the lobby area, he can cause quite -- if a person is in fact intoxicated, stumble and fall and cause an injury."

In addition, Lieutenant Coleman testified that letting plaintiff, an allegedly intoxicated prisoner, out of his cell to make a phone call was

consistent with procedures in effect at the precinct.

When this testimony is viewed in a light most favorable to the plaintiffs and plaintiffs are given the benefit of every reaosnable inference which can be drawn from the evidence, I conclude that sufficient evidence was presented to establish that the City either had a policy of failing to train its doormen or that the training provided was so grossly negligent that it amounted to "deliberate indifference". Furthermore, Donley's testimony establishes that the lack of adequate training was likely to cause the very danger which befell plaintiff. Because the doorman was inadequately trained, he permitted a visibly intoxicated person to leave his cell thereby rendering it likely that an injury would occur. Accordingly, the jury could infer that by failing to train its doormen, the City exhibited a deliberate indifference to the resulting violation.

That there was testimony that the city met state standards is not dispositive if those standard are themselves inadequate.

The City contends that municipal policy could never be established absent deliberate action by a designated municipal policymaker. While concededly, Justice Rehnquist, in a footnoote to Tuttle[1] raises the question, he also specifically refused to address it. See 85 L Ed 2d 804, fn 7. And the actual holding of Tuttle is far more limited. Tuttle stands for the proposition that an isolated incident of police mis-conduct can never establish municipal liability. Since plaintiffs' allegations of municipal policy are supported by more than the single incident complained of, Tuttle does not bar recovery in the instant action. Moreover, in light of the expert testimony regarding the City's training program, the jury could infer that the absence of adequate training or the failure to routinely implement adequate

training was a conscious decision by the City's policymakers.

Unlike the situation in Tuttle, plaintiffs here presented evidence of a city-wide lack of adequate training, or at least, a grossly negligent training program. The jury's decision was not based on the single, isolated incident but rather on the City's overall failure to provide adequate training as testified to by Beckman and Donley. The expert testimony was sufficient to establish a municipal policy upon which to render the City liable. While defendant cast considerable doubt on the opinions of plaintiff's experts, the jury, in weighing the experts testimony, obviously resolved those doubts in favor of plaintiffs.

Unlike the majority, I would hold that plaintiffs did establish an "affirmative link" between the City policy and the constitutional deprivation. Tuttle, 105 S Ct 2436. Both experts testified that proper training would have alerted a

doorman to the dangers inherent in caring for intoxicated prisoners. Moreover, Donley specifically stated that one of the dangers attendant upon letting an intoxicated person out of his cell was that the prisoner might stumble and fall and injure himself. Accordingly, the complete failure to train the doorman made the risk of personal injury highly likely and the City's failure to train could be viewed as the "moving force" of the violation, i.e. the injury. I would affirm.

I also cannot agree with the majority that the absence of defendant David Murray was adequately handled. The absence of David Murray was a point of confusion and contention throughout these proceedings. I am convinced that the plaintiffs were at least entitled to an instruction as to Murray's absence.

One variation of the standard jury instructions, SJI 2d 6.02, reads:

"(The [plaintiff/defendant] in this case has not offered [the testimony of _____/ _____]. You may infer that this evidence would have been adverse to the [plaintiff/defendant] if you believe that the evidence was under the control of the [plaintiff/defendant] and could have been produced by [him/her], and no reasonable excuse for [plaintiff's/defendant's] failure to produce the evidence has been shown.)"

This instruction, if requested, should be given when a question of fact arises regarding both "control" and "reasonable excuses". Both questions were raised in the present case and therefore the instruction was applicable.

The Supreme Court has held that when an accurate and applicable standard jury instruction has been requested by a party, it should be given by the trial court if the court gives any instruction at all on the subject covered by the requested instruction. Socha v Passino, 405 Mich 458, 467; 275 NW2d 243 (1979). In Javis v Ypsilanti Board of Education, 393 Mich 689; 227 NW2d 543 (1975) our Supreme Court held that reversal was required where an applicable and

requested jury instruction was not given. In Johnson v Corbet, 423 Mich 304; 377 NW2d 713 (1985), however, the Supreme Court decided that the Javis rule need no longer be applied.

Rather, the Johnson Court concluded that failure to give a requested and applicable jury instruction should be reviewed under the harmless error standard of GCR 1963, 529 [MCR 2.6139(a)] and that the appellate court should set aside a jury verdict only if the failure to do so would be "inconsistent with substantial justice".

In my opinion, the standard jury instruction was clearly applicable and appropriate to the present case. The instruction is meant to encompass situations where there is a question of fact regarding the cause of the defendant's absence. Such a question of fact was obviously present in this case. In addition, the questions which the jury asked regarding Murray's absence and the judge's comments on the his absence further

indicate that the instruction was applicable. Moreover, the instruction given by the trial court deviated widely from the standard instruction and failed to make any reference to the inferences contained in the instruction.

Because the question of Murray's absence was raised during the trial and because the court itself noted and instructed the jury on Murray's absence, the court erred in failing to give SJI 2d 6:01. Considering David Murray's pivotal role in the events resulting in the injuries, the failure to give the appropriate instruction cannot be viewed as harmless error, and plaintiff's are entitled to a new trial as to David Murray even if the jury verdict as to City is overturned.

Except for these two points, I concur in Judge Batzer's opinion.

/s/ Harold Hood

1. City of Oklahoma City v Tuttle, _____ US ____; 105 S Ct 2427; 85 L Ed 2d 791 (1985), relied on in the majority opinion.

APPENDIX B

ORDER

(Michigan Supreme Court)

(Entered February 22, 1988)

81500
81500(68)

MAJOR F. BOGGERTY and
ADEN BOGGERTY,

Plaintiffs-Appellants,

v

SC: 81500
COA: 82510
LC: 81-107897-NO

EARNESTINE WILSON, JACKIE VEASLEY, CYNTHIA MARTIN, DAVID MURRAY and LT. WARREN COLEMAN,

Defendants-Appellees,

and

CITY OF DETROIT,

Defendant-Appellee
Cross-Appellant.

On order of the Court, the application for leave to appeal and the application for leave to

appeal as cross-appellant are considered, and they are DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Levin and Archer, JJ., would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

February 22, 1988 /s/ Corbin R. Davis

APPENDIX C

ORDER

(Michigan Supreme Court)

(Entered May 31, 1989)

81500
(74)

MAJOR F. BOGGERTY and
ADEN BOGGERTY,

Plaintiffs-Appellants,

v

SC: 81500
CoA: 82510
LC: 81-107897-NO

EARNESTINE WILSON, JACKIE VEASLEY, CYNTHIA MARTIN, DAVID MURRAY, and WARREN COLEMAN,

Defendants-Appellees,

and

CITY OF DETROIT,

Defendant-Appellee,
Cross-Appellant.

On order of the Court, the motion for reconsideration of this Court's order of February 22, 1988, is considered, and it is DENIED, because

it does not appear that the order was entered erroneously.

Levin, J., would grant reconsideration and would grant leave to appeal.

10524

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 31, 1989

/s/ Corbin R. Davis

APPENDIX D

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

MAJOR F. BOGGERTY and
ADEN BOGGERTY,

Plaintiffs,

vs. Case No. 81 107897-NO

EARNESTINE WILSON, et al,

Defendants.
_____/

SPECIAL VERDICT

1. SECTION 1983: Do you find any of the individual Defendants violated Plaintiff MAJOR BOGGERTY'S constitutional rights? (Answer yes or no as to each Defendant).

EARNESTINE WILSON _____NO_____

JACKIE VEASLEY _____NO_____

CYNTHIA MARTIN _____NO_____

DAVID MURRAY _____NO_____

WARREN COLEMAN _____NO_____

2. FALSE ARREST AND IMPRISONMENT: Do you find

that any of the individual defendants falsely arrested and imprisoned Plaintiff MAJOR BOGGERTY? (Answer yes or no as to each Defendant).

EARNESTINE WILSON NO

JACKIE VEASLEY NO

CYNTHIA MARTIN NO

3. ASSAULT AND BATTERY: Do you find that any of the individual Defendants committed an assault and battery on Plaintiff MAJOR BOGERTY or assisted in such assault and battery on Plaintiff MAJOR BOGGERTY? (Answer yes or no as to each Defendant).

DAVID MURRAY NO

WARREN COLEMAN NO

4. Was the liability of any of the individual Defendants a proximate cause of injuries or damage to the Plaintiff? If so, whom: (Answer yes or no as to each Defendant)

EARNESTINE WILSON NO

JACKIE VEASLEY NO

CYNTHIA MARTIN _____NO_____

DAVID MURRAY _____NO_____

WARREN COLEMAN _____NO_____

IF YOU ANSWERED "NO" TO THE ABOVE QUESTION, DO NOT ANSWER QUESTION NO. 5 BUT GO ON TO QUESTION NO. 6. IF YOU HAVE ANSWERED QUESTIONS 1, 2, 3 OR 4 "YES", ANSWER QUESTION NO. 5.

5. DAMAGES UNDER THE PREVIOUS CAUSES OF ACTION:

As to Plaintiff MAJOR BOGGERTY:

(a) We award Plaintiff compensatory damages in the amount of:

Actual $_____ Exemplary_____

(Answer this question only if you have answered "yes" to the question regarding violation of Plaintiff's Constitutional rights in paragraph No. 1)

(b) We award Plaintiff punitive damages in the amount of $_____

6. (a) Without regard to your previous findings above, do you find that any of the individual

Defendants were negligent in the manner they dealt with Plaintiff MAJOR BOGGERTY?

(Answer yes or no as to each Defendant).

EARNESTINE WILSON _____ NO _____

JACKIE VEASLEY _____ NO _____

CYNTHIA MARTIN _____ NO _____

DAVID MURRAY _____ NO _____

WARREN COLEMAN _____ NO _____

IF YOUR ANSWER IS "NO", PROCEED DIRECTLY TO THE QUESTION UNDER PARAGRAPH NO. 7.

(b) Was the negligence of the individual Defendants who were negligent a proximate cause of the injuries or damages to Plaintiff?

ANSWER:_____(Yes or No)

IF YOUR ANSWER IS "NO", PROCEED DIRECTLY TO THE QUESTION UNDER PARAGRAPH NO. 7.

Without duplicating any money damages that might have been awarded under the previous causes of action, what is the total amount of plaintiff's damages as it pertains to the Defendants' negligence, if any?

(a) As to Plaintiff MAJOR BOGGERTY:

Actual $_____ Exemplary $_____

Was the Plaintiff MAJOR BOGGERTY negligent?

ANSWER:_____(yes or No)

IF YOUR ANSWER IS "NO", PROCEED DIRECTLY TO THE QUESTION UNDER PARAGRAPH NO. 7

Was the Plaintiff's negligence a proximate cause of the injury or damage to the Plaintiff?

ANSWER:_____ (Yes or No)

IF YOUR ANSWER IS "NO", PROCEED DIRECTLY TO THE QUESTIONS UNDER PARAGRAPH NO. 7.

Using 100 percent (100%) as a total combined negligence which proximately caused the injury or damage to the Plaintiff, what percentage of such negligence is attributed to the Plaintiff?

ANSWER:_____ percent

Please note that the Court will reduce the amount of money damages under this paragraph No. 6 by the percentage of negligence you

attribute to Plaintiff, if any. The remainder will be the amount which Plaintiff is entitled to recover as a result of the Defendants' negligence.

7. SECTION 1983 (City of Detroit): Do you find that the City of Detroit failed to train its police force, or trained it in a reckless or grossly negligent manner, or was deliberately indifferent to training required, so that future police misconduct was almost inevitable, or do you find that there was a policy, custom, ordinance or procedure which violated Plaintiff MAJOR BOGGERTY'S constitutional rights?

YES _____X_____ NO _____

If the answer to the above was YES, then determine whether this was a proximate cause to Plaintiff MAJOR BOGGERTY'S injuries. If the answer to the above is NO, then go on to Question No. 8.

Was the City's liability above the proximate

cause of Plaintiff MAJOR BOGGERTY'S injuries?

YES _____X_____ NO_____

If the answer to the above is YES, then indicate the amount of money damages you award Plaintiff:

Actual $ 550,000

Exemplary $_____

8. As to Plaintiff ADEN (LOUISE) BOGGERTY:

(Answer this question only if you have answered yes to one or more of the questions above)

(a) We award Plaintiff ADEN (LOUISE) BOGGERTY compensatory damages in the amount of $50,000

DATED:_____ _____

JURY FOREPERSON

89-1047

Supreme Court, U.S.
FILED
AUG 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1989

MAJOR F. BOGGERTY and ADEN BOGGERTY,

Petitioners,

vs.

EARNESTINE WILSON, JACKIE VEASLEY, CYNTHIA MARTIN, DAVID MURRAY and LT. WARREN COLEMAN,

Respondents,

and

THE CITY OF DETROIT,

Respondent.

APPENDIX E AND F

Lawrence D. Hochman
Melvyn D. Saperstein
29800 Telegraph Road
Southfield, MI 48034
(313) 353-6500

APPENDIX E
EXCERPTS FROM TRANSCRIPT OF DR. ERIK BECKMAN

PAGE 35:

THE COURT: We are talking about a single person now. You are not answering my question. I am talking about Officer Wilson. Do you know what training she received and what on-the-job training she received, what training she received in the Academy; do you know that?

THE WITNESS: Yes, Your Honor.

THE COURT: You know that of your own knowledge?

THE WITNESS: Yes, Your Honor.

THE COURT: All right. I think you should lay it out on the record, of what he knows.

Q. (Continuing by Mr. Howarth): Dr. Beckman, what is it that you know about Earnestine Wilson's training, and can you tell us

where, from what source that knowledge comes to you?

A. The officer describes having completed the Police Academy, which is a Police Academy with a curriculum which meets the approval of the State of Michigan.

Q. What else, if anything, do you know about the training?

THE COURT: We are talking 1979, you understand that?

MR. HOWARTH: Yes.

THE COURT: All right.

Q. What, if anything else, do you know about the training Earnestine Wilson received up to October, 1979?

A. Just her description that it was hurried-up training.

the objection, beyond that of Mr. Seward, would go to weight.

MR. SEWARD: Well, as I understand it, he was asked what he based his knowledge on and he says he knows what training she received because she testified she completed the Detroit Police Academy which he considers to be an acceptable standard, and as far -- so I am not sure I know where the question is going.

THE COURT: Well, we have to await the next question.

Q. Doctor, you say you formed an opinion. In your opinion, was Police Officer Earnestine Wilson, as of October 24, 1979, a properly trained police officer, given the standards that you enunciated to us earlier?

MR. SEWARD: I have a continued objection. I don't mean to keep interrupting, Doctor.

THE COURT: Go ahead.

Q. Doctor, what is your opinion?

A. She did not meet those standards.

Q. In what ways, Doctor, was Earnestine Wilson deficient as far as training was concerned?

A. She was not given that training which is required, according to National Standards after the Police Academy, and those standards require continuous in-service training at a minimum, 40 hours a year, although that would generally be

conceived as not enough, but that is an established minimum; it would not be very good. So that each police officer received refresher training as well as training in new additional material throughout his or her police career, from the date of graduation until their retirement and Officer Wilson did not receive such training.

Q. Thank you. Dr. Beckman, did you review material relating to a patrolman, police personnel by the name of David Murray?

A. Yes, I did.

Q. What material did you review with reference to Patrolman David Murray?

A. I read his Injured Prisoner Report as well as his deposition.

Q. Did you apply any standards in making

a comparison to David Murray's actual training and the standards that you have enunciated for us earlier?

A. I formed an impression of the training that he had.

Q. All right. Doctor, in your opinion, was the training of David Murray sufficient for the position of police Doorman as of October 24, 1979?

MR. SEWARD: Same objection, Your Honor, for the same reasons that I raised in the earlier question.

THE COURT: I think at this point the objection is well taken because he laid no foundation as to what he knows about the training of Officer Murray.

PAGE 39:

MR. HOWARTH: Thank you, Your Honor.

Q. What did you find out was the level of training for Patrolman Officer David Murray, most especially, Dr. Beckman, with respect to being a Doorman?

A. There was no special training for that particular assignment.

Q. How does that comport, if at all, to the National Standards?

A. It does not meet those standards.

Q. What are the standards with respect to the training of Doormen?

A. The National Standards indicates that each police officer must be trained on a regular basis after leaving the Police Academy, in the normal duties performed by that police officer. It has to include certain basic things as well, but it has to be job-related.

Q. Based upon the statements of Officer Murray as to his training, based upon the standards as you know them, did you form a conclusion as to whether Officer David Murray was properly trained as a Doorman as of October 24, 1979?

MR. SEWARD: Just so the record is clear, I have a continuing objection to this line of questioning.

THE COURT: He still hasn't said anything about what he knows to be the training of Officer Murray.

MR. HOWARTH: Well, Your Honor, my understanding was that Dr. Beckman testified that Officer Murray's

PAGE 40:

the deposition indicated he had no training to be a Doorman.

THE COURT: Put it in the record, if you want to, put it in so we know what you are talking about. We don't know. Let him state what he knows to be the training of Officer Murray.

Q. Dr. Beckman, what do you know to be the training of Officer Murray as of October 24, 1979?

A. My recollection from the documents, there was no training for that position.

Q. Which position?

A. Of Doorman at the precinct.

Q. Based upon that, do you have any opinion as to whether Officer Murray was properly trained as a Doorman?

A. He was not.

Q. Okay. Dr. Beckman, what do you under-

stand the position of Doorman to be?

A. It's a position I refer to a jailer, lock-up jailer, a person in charge of the lock-up facility.

Q. Doctor, do you regard that as an important, unimportant or somewhere in the middle between those two extremes, position within the police precinct work?

A. Well, it's an important position. I would not refer to any police position with anything else than important, however.

Q. Doctor, what training might a person receive, according to the National Standards that you have given us this morning,

PAGE 42:

Q. Go ahead. I will ask it again, it probably will be easier. What do you mean by "booking charges"?

A. Charges on which a prisoner is booked so the jailer has an understanding of whether it is a violent arrestee or non-violent arrestee; whether it's a felony or misdeameanor. The individual jailer or Doorman must have training in the care and safety of prisoners to detect degrees of intoxication, degrees of a person possibly under the influence of drugs, a person who might be depressed and/or suicidal. A person in need of medical attention, all of which require note-taking and classification of that prisoner, and in some cases, action upon those findings. Furthermore, suicide prevention, if I haven't already said

that. Lodging of a prisoner. The individual must have an understanding of jail operation principles such as the necessity for checking on a prisoner at regular intervals; is determined by that person's condition and that's really a partial list. But I think that is --

Q. (interposing): I understand, Doctor. Did you review any materials with respect to the training procedures and education of a person known as Lt. Warren Coleman?

A. Yes, I did.

Q. What materials did you review?

A. The lieutenant's deposition.

Q. What did you determine as to what training Lt. Coleman had

PAGE 44:

been an adequate foundation for the witness to testify to what training this man has received in the last 24 years.

THE COURT: He has given what foundation he had. Now whether it is adequate or not will go to the weight of the testimony given to the jury.

MR. SEWARD: Very well.

MR. HOWARTH: Thank you.

Q. When you made the comparison, Dr. Beckman, did you form a conclusion as to whether Lt. Coleman, as of October, 1979, was adequately trained to a Shift Commander at the precinct level?

A. Assuming that what I read is true and correct and reflects that training which the person has received.

Q. Let's assume that?

A. Then the answer: That there is no conformance with National Standards.

Q. In what way was the training given to Lt. Coleman, assuming the answers in the deposition testimony were correct, in what way was Lt. Coleman's training deficient?

A. The lack of annual in-service continuous training that is job-related.

Q. Dr. Beckman, you have indicated that you are familiar with the training that was being provided by the Detroit Police Department between the years 1970 and 1979, to police officers, sergeants, lieutenants; is that correct or have

PAGE 45:

I misstated what you have testified?

A. Would you repeat the years?

Q. Sure, 1970 thru 1979?

A. Yes, sir, that is correct.

Q. Would you tell us again how you became familiar with the training procedures within that period of time?

A. By keeping abreast of the field, by having conversations with police officers of various ranks, some within the Detroit Police Department, some outside the Detroit Police Department, and feedback about different levels of training that exists in different police departments.

Q. Dr. Beckman, based upon that, were you able to form an opinion as to whether the training methods used by the Detroit Police Department, between the years 1970 and 1979, did or did not comport

to National Standards?

A. Yes, I have an opinion.

Q. And what is your opinion?

A. They did not and never have.

MR. HOWARTH: Thank you, Doctor. I have no further questions.

MR. SEWARD: I don't have any questions.

CROSS-EXAMINATION

BY MR. DANIEL:

Q. Dr. Beckman, you read -- you listed a number of documents that you reviewed in order to come to the conclusions that

PAGE 55:

A. It never lost its certification.

Q. That is my question. I don't want you to jargon on. I am asking you whether there was ever a period of time between 1970 and 1979, that the Police Academy was not certified by this agency?

A. It never went that far, but there was a threat of loss of certification.

Q. I am not talking about threats. Did the Council ever say: "You are not qualified to instruct police officers in the State of Michigan:" "yes" or "no"?

A. Yes, that was said to the Detroit Police Academy.

Q. And was the certification taken away?

A. It never went that far.

Q. When was that, sir?

A. In the 1970's.

Q. When?

A. I can't give you the date today.

Q. Pin it down? Well, you say you know the training was defective. You are certified here as an expert; when between 1970 and 1979 was that statement ever made?

A. I would say approximately during the mid-'70's.

Q. Can you be more specific than that?

A. No, not without going to the records. The statement was made.

Q. And can you tell me how many hours of training they give to

PAGE 81:

into his groin? What training do you understand the police didn't receive that would have prevented them from doing that?

A. Training in the use of force, the limitations of the law regarding use of force.

Q. Are you suggesting that you believe that if someone did that to Mr. Boggerty it was because they weren't trained to know that was the wrong thing to do? Sir, do you need to be a policeman to be trained to know? Do you -- as a man, didn't you learn, as a very young boy, it was improper to knee someone in the groin or did you just learn that when you went to the Police Academy out in Orange County?

A. No.

Q. Sir?

A. I am trying to respond to your question.

Q. Are these tough questions? I will ask you again. I want to make them simple. Is it your notion that you have to be trained at a Police Academy to know you shouldn't knee a grown man in his testicles or is that something you probably learned when you first started playing games before you went to nursery school?

A. One wouldn't expect training to be detailed, necessarily, and repeated on something as simple as that, but according to the material in this case, nevertheless, that is one

APPENDIX F
EXCERPTS FROM DEPOSITION TRANSCRIPT OF FRANK DONLEY

PAGE 43:

training that he understands Mr. Murray got before.

THE COURT: It is a preliminary question. He can answer it "yes" or "no". If he has an opinion, then he will have to give him a hypothetical question; there is no question. Go ahead.

Q. Do you have an opinion?

A. Yes.

Q. He was not properly trained?

A. He was not properly trained.

Q. And what do you base that opinion on, sir?

A. Mr. Murray's deposition testimony.

Q. And what did Mr. Murray indicate at his deposition about his training?

A. That he received no training as a

Doorman.

Q. Did he indicate anything else with regard to his hiring and training as a Doorman for the City of Detroit Police Department?

A. He said he had not been trained to work, to carry out the Doorman function. He was not aware of any training programs.

Q. At that point in time, based on your personal knowledge, did the City of Detroit have a training program for its Doormen?

A. Yes.

Q. And what program was that?

A. The Detention Officer Training curriculum of 168 hours.

PAGE 46:

A. The idea is to get that prisoner, an intoxicated one that is acting in a violent manner, under control in an area where they can be safe and the staff is also safe while and until that person is able to care for himself or herself.

Q. And if Mr. David Murray had been properly trained and the individual had been placed in a cell, what should have been his responsibilities, if any?

A. Well, if the prisoner was visibly intoxicated, then he should not have been removed from that cell to make a phone call.

MR. DANIEL: He should not have been removed?

THE WITNESS: That is correct.

Q. Why do you say that, sir?

A. Well, there is a number of reasons. A person could fight. When he is in the

cell, locked in a cell, it is very unlikely -- not much harm can be done to anybody. If he is taken out of the cell and has contact with an officer or people out in the lobby area, he can cause quite -- if a person is in fact intoxicated, stumble and fall and cause an injury.

Q. Are there any other reasons why the person should not have been taken out of the cell if there is a claim that the person was intoxicated?

A. No, not unless the person is bonded out and there is somebody to care for that individual.

PAGE 60:

A. Yes.

Q. Have you reviewed -- explain to the jury other materials you have reviewed in order to come to court today to testify regarding this case?

A. This question was in the deposition of Inspector James Jackson who is director of the Training Academy.

Q. Do you know Inspector Jackson, personally?

A. Yes.

Q. Have you ever been associated with the training program at the criminal Justice Institute, with the Detroit Police Department?

A. Consulted with Mr. Jackson and his staff in setting up the training curriculum in 1978 and '79 for detention officers.

Q. Based on your knowledge of the training programs which is set up or has been set

up by the City of Detroit Police Department regarding the detention practices, do you have a professional opinion as to whether the City of Detroit has a history of properly training its Doormen?

A. Yes.

Q. And what is that opinion, sir?

A. They are not properly trained.

Q. On what do you base your professional opinion, sir?

A. Primarily the deposition testimony of Inspector Jackson and he indicates that he is aware of only one training program for the detention officers and he believes it occurred in

PAGE 77:

Doormen and lieutenants at local precincts during that period of time?

A. I don't understand your question, Mr. Mateo.

Q. I think it's a little convoluted. For that period of time, January '79 thru October '79, you indicated you only received the one list?

A. Yes.

Q. Okay. Let me start it this way: Is it your professional opinion there should be an ongoing training program for all Doormen for the City of Detroit?

A. Yes.

Q. Is it your professional opinion that an ongoing training program should be going on on a continuing basis?

A. Yes.

Q. What do you mean by "continual basis"?

A. That the initial training program consists of 168 hours and then 40 hours a year after that as an update.

Q. Is it your professional opinion, before a Doorman or lieutenant is placed in that position, that everyone should go through that training procedure?

A. Yes.

Q. Now during the period of time from early January 1979 to October of 1979, do you have a professional opinion as to whether there was or was not an ongoing training program in the City of Detroit Police Department for Doormen and

person, insuring that he gets medical attention. Do you have a professional opinion as to whether both the lieutenant and the Doormen were properly trained to handle that entire situation?

MR. SEWARD: That has been asked and answered. I think he said he does not have an opinion nor can he form an opinion whether they were trained or didn't carry out their training properly or whether they were simply not trained.

THE COURT: I understand he answered it. Answer it again.

THE WITNESS: Can I refer to the testimony that I have read?

THE COURT: You just answer that question.

Q. Do you need assistance or do you need

to rely on information that you have right now?

A. The deposition testimony I read.

Q. Okay. What deposition testimony is that?

A. The lieutenant's deposition testimony and the deposition testimony of Doorman Murray.

Q. Okay. And based on that testimony, do you have an opinion as to the question I just asked you?

A. Yes.

Q. What is that opinion?

A. That they were not trained.

PAGE 99:

I think I can make that objection.

Q. In order for you — you have rendered an opinion here today?

A. Yes.

Q. You have rendered other opinions to Mr. Mateo; is that right?

A. Yes.

Q. In order to render those opinions, did you have to come to conclusions in your own mind, on the question of whether or not Mr. Boggerty was drunk or not? you can answer that "yes" or "no". Did you have to come to conclusions or could you render the opinions you did without coming to conclusions on that question?

A. I did not come to conclusions on the question.

Q. So as you sit here right now, you have not formulated an opinion as to whether or not, at the time of this incident, Major Boggerty was intoxicated or not intoxicated?

A. No.

Q. You are telling the jury you could still render an opinion even though you have not resolved that question?

A. Yes.

Q. If he was not intoxicated, sir, wouldn't it be true that whether or not these officers were trained in handling intoxicated persons, wouldn't matter?

A. They must be trained whether the person is intoxicated or not.

Q. No, listen to my question. Listen to my question. You

PAGE 100:

testified that the lieutenant and the Doorman, in your opinion, their training was not appropriate?

A. Yes.

Q. Is your testimony that you don't have to conclude whether or not this gentleman was intoxicated, to arrive at that conclusion?

A. That's correct.

Q. It doesn't matter to you one way or the other?

A. It does not.

Q. You are saying, that whether he was drunk or if he wasn't drunk, if he was sober, they weren't appropriately trained to handle him?

A. That is correct.

Q. So you are saying this training wasn't adequate, right across the board?

A. Yes.

Q. And you come to that conclusion based on the fact that Mr. Murray said — as to Mr. Murray — that "I had not received any training"?

A. I came to that conclusion based upon the fact Mr. Murray stated that, in his opinion, Mr. Boggerty was very intoxicated.

A. (interposing): And additionally, that he had no training.

Q. Let's take one gentleman at a time, Mr. Donley. If there

89-1047

No. 89-___

Supreme Court, U.S.
FILED
FEB 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

MAJOR F. BOGGERTY and ADEN BOGGERTY,

Petitioners,

v

EARNESTINE WILSON, JACKIE VEASLEY, CYNTHIA MARTIN, DAVID MURRAY, LT. WARREN COLEMAN,

Respondents,

and

THE CITY OF DETROIT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

GARAN, LUCOW, MILLER, SEWARD, COOPER & BECKER, P.C.
By: MATTHEW A. SEWARD
ROSALIND ROCHKIND
Counsel of Record
Attorneys for Respondent City of Detroit
1000 Woodbridge Place
Detroit, Michigan 48207-3192
(313) 446-5503

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

26 pp

COUNTER-QUESTION PRESENTED

WAS THE JURY VERDICT IMPOSING MUNICIPAL LIABILITY UNDER 42 USC § 1983 PROPERLY REVERSED WHERE NEITHER THE PLEADINGS NOR THE EVIDENCE PRODUCED AT TRIAL SUPPORTED A FINDING OF A CITY POLICY OF INADEQUATE TRAINING WHICH WAS CAUSALLY RELATED TO A CONSTITUTIONAL DEPRIVATION?

TABLE OF CONTENTS

	Page
Counter-Question Presented	i
Table of Authorities	iv
Opinion Below	1
Jurisdiction	1
Statutory Provision Involved	2
Counter-Statement of The Case	2
Reasons Why The Writ Should Be Denied:	
I. THE REVERSAL OF THE JURY VERDICT IN THIS CASE IS CONSISTENT WITH *CITY OF CANTON* v *HARRIS*, __ US __; 109 S. CT. 1197; 103 L ED 2D (1989).	6
II. REGARDLESS OF THE STANDARD APPLIED, THE EVIDENCE IN THIS CASE WAS INSUFFICIENT TO ESTABLISH EITHER A CITY POLICY OF INADEQUATE TRAINING OR AN AFFIRMATIVE LINK CONNECTING SUCH POLICY TO A RELEVANT CONSTITUTIONAL DEPRIVATION.	10
III. PETITIONERS' PLEADINGS FAILED TO ALLEGE A POLICY OR CUSTOM OF THE CITY OF DETROIT WHICH WAS A DIRECT CAUSE OF A CONSTITUTIONAL DEPRIVATION AND THIS CASE SHOULD HAVE BEEN DISMISSED AT THE PLEADING STAGE.	18
IV. PETITIONERS' THEORY OF MUNICIPAL LIABILITY PRESUPPOSED THAT PETITIONER'S TESTIMONY WAS FALSE CONCERNING FACTS WITHIN HIS OWN PERSONAL KNOWLEDGE.	20
Conclusion	21

TABLE OF AUTHORITIES

Page(s)

Cases:

Baker v *McCollan*, 443 US 137; 99 S. Ct. 2689; 61 L Ed 2d 433 (1979) 16

City of Canton v *Harris*, ___ US ___; 109 S. Ct. 1197; 103 L Ed 2d 412 (1989) 6, 7, 8, 9, 10-11, 12, 14, 15, 21

Hays v *Jefferson County, Kentucky*, 668 F2d 869 (6th Cir 1982) 8

Monell v *New York City Department of Social Services*, 436 US 658; 98 S. Ct. 2018; 57 L Ed 2d 611 (1978) 8

Paul v *Davis*, 424 US 693; 96 S. Ct. 1155; 47 L Ed 2d 405 (1976) 16

Polk County v *Dodson*, 454 US 312; 102 S. Ct. 445; 70 L Ed 2d 509 (1981) 8

Rymer v *Davis*, 754 F2d 198 (6th Cir 1984), vacated and remanded *sub nom*, *City of Shepherdsville, Kentucky* v *Rymer*, 473 US 901; 105 S. Ct. 3518; 87 L Ed 2d 646, reinstated, 775 F2d 756 (6th Cir 1985) 8, 10

Other Authorities:

28 USC § 1257(a) 2

42 USC § 1983 ..... 2, 3, 4, 5, 7, 10, 16, 17, 19, 22

No. 89-___

In The

Supreme Court of the United States

October Term, 1989

MAJOR F. BOGGERTY and ADEN BOGGERTY,

Petitioners.

v

EARNESTINE WILSON, JACKIE VEASLEY, CYNTHIA MARTIN, DAVID MURRAY, LT. WARREN COLEMAN,

Respondents.

and

THE CITY OF DETROIT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, City of Detroit, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Michigan Court of Appeals' opinion in this case.

OPINION BELOW

The opinion of the Michigan Court of Appeals is reported at 160 Mich App 514; 408 NW2d 809 (1987). Leave to appeal was denied by the Michigan Supreme Court at 430 Mich 851 (1988); recon den, 432 Mich 911 (1989).

JURISDICTION

The opinion of the Michigan Court of Appeals was entered on June 2, 1987. Petitioners' application for leave

to appeal to the Michigan Supreme Court was denied on February 22, 1988, and their motion for reconsideration of this denial was denied on May 31, 1989. Petitioners seek to invoke this Court's jurisdiction under 28 USC § 1257(a).

STATUTORY PROVISION INVOLVED

United States Code, Title 42:

§ 1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

COUNTER-STATEMENT OF THE CASE

On October 24, 1979, Petitioner Major Boggerty was arrested by officers of the Detroit Police Department for possessing open intoxicants in a motor vehicle and for disorderly conduct. He was taken to Detroit's Eleventh Precinct where he was charged with driving under the influence of liquor. While at the police station, and under disputed factual circumstances, he injured his hip.

Petitioner's position throughout the proceedings below was that Mr. Boggerty was completely sober and was injured as a result of an attack by Detroit police officers. The only witness to the events immediately preceding Plaintiff's injury was Officer David Murray. Murray testified at his deposition that Mr. Boggerty was in a highly intoxicated state and that he tripped and fell against a large, metal trash container, pulling Murray down on top of him. Murray did not testify at trial; nor was his deposition offered in evidence.

As a result of his injuries, Petitioner Major Boggerty and his wife, Aden, commenced suit in Wayne County Circuit Court against the City of Detroit and five of its police officers, alleging negligence and 42 USC § 1983 liability: Petitioners alleged that each of the officers was guilty of negligence, assault and battery, false arrest and false imprisonment, and that the city was liable under 42 USC § 1983.

On May 20, 1983, the City filed a motion for summary judgment on the basis that Petitioners had failed to state a claim under federal law and that it was entitled to governmental immunity as to the state claims alleged. With regard to the § 1983 claim, the City argued that the Complaint failed to adequately allege a policy or custom of the City which was a direct cause of the deprivation of a constitutional right. The motion was denied by the pretrial judge and again denied when renewed on the day of trial by the trial judge.

Trial commenced on June 5, 1984. As reflected in the opinion of the Michigan Court of Appeals[1], vastly conflicting versions of the events of Petitioners arrest and subsequent injury were offered at trial.[2] According to

---

[1] Petitioners' Appendix, pp. A2-A8.

[2] Petitioners' Statement of the Case ignores this conflict and ignores the implications of this conflict to the legal issues presented.

Petitioner, (1) he was completely sober at the time of his arrest and detention at the police station; and (2) he had been brutally assaulted by Officer David Murray and other unidentified police officers while held down on the floor. This story conflicted with the Respondent's version of a highly intoxicated prisoner who fell.

There was no dispute, however, that after his injury, EMS was called and would have taken Petitioner to a hospital but for Petitioner's insistance that he go to a specific hospital. EMS could not comply with this requirement and Petitioner was taken to the hospital of his choice by his wife and a friend. Hospital records noted no bruises or abrasions other than a injury to Petitioner's hip, and these records did note that Petitioner was intoxicated upon his arrival.

In support of their assertion of § 1983 liability against the City, Petitioners presented two witnesses, Eric Beckman and Frank Donley, each of whom testified that the training policy formulated by the City was a good program. Each, however, had reservations concerning the training received by the individual defendant police officers.

However, neither expert had any knowledge of the actual training received by these, or any, Detroit officers.

As reflected in Petitioners' Appendix D, pp. D1-D5, the jury, in answers to specific questions drafted by counsel for Petitioners, exonerated each of the individual police officers from any liability to Petitioners: None of the officers involved in the arrest had falsely arrested or imprisoned Petitioner. Neither of the officers involved with Petitioner at the police station had committed an assault and battery on Petitioner or assisted in any assault and battery. None of the officers was negligent in the manner in which he dealt with

Petitioner. None of the officers violated Petitioner's constitutional rights.

The jury nevertheless imposed § 1983 liability on the City, answering "yes" to the following question:

> Do you find that the City of Detroit failed to train its police force, or trained it in a reckless or grossly negligent manner, or was deliberately indifferent to training required, so that future police misconduct was almost inevitable, or do you find that there was a policy, custom, ordinance or procedure which violated Plaintiff Major Boggerty's constitutional rights?

Judgment was entered on the jury verdict against the City of Detroit and in favor of the individual Defendant police officers. The City filed a timely motion for judgment notwithstanding the verdict arguing, among other things, of the insufficiency of the evidence to establish a custom or policy of the City which was affirmatively linked to a constitutional deprivation. The City also reiterated that Petitioners' pleadings had been likewise deficient and failed to give notice of the Petitioners' claims. That motion was denied and the City filed a claim of appeal to the Michigan Court of Appeals.

On appeal, the judgment entered against the City was reversed on the basis that Petitioners had failed to present sufficient evidence of municipal liability under 42 USC § 1983. In part, the Court stated:

> In the case *sub judice*, Plaintiffs' *own* expert testified that the training of Detroit police officers met all state standards. Plaintiffs presented no evidence that the standards their experts relied on were accepted generally by municipal departments or were of such a nature that the failure to live up to them was substan-

> tially likely to result in injury. Plaintiffs presented no evidence of similar incidents at other precinct lock-ups (footnote omitted). The City's mere failure to measure up to published training standards thought by Plaintiffs' expert to be superior to the standards of Michigan law and its failure to follow through on its own written standards does not make a prima facie case. Plaintiffs' evidence when viewed most expansively can establish no more than negligence on the City's part. Such a quantum of fault is insufficient.

(Petitioners' Appendix A16)

Petitioners sought a rehearing before the Michigan Court of Appeals, which was denied. They thereafter filed an application for leave to appeal to the Michigan Supreme Court. Respondent City filed a cross-application for leave to appeal to the Michigan Supreme Court, seeking to preserve additional grounds advanced in support of a reversal of the jury verdict. The Michigan Supreme Court denied the applications, and thereafter denied Petitioners' motion for rehearing.[3]

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE REVERSAL OF THE JURY VERDICT IN THIS CASE IS CONSISTENT WITH *CITY OF CANTON* v *HARRIS*, __ US __; 109 S. CT. 1197; 103 L ED 2D (1989).

In support of their Petition for Writ of Certiorari, Petitioners argue that the holding of the Michigan

---

[3] Although not pertinent to the pending application, it may be noted that the Petitioners filed a cross-appeal to the Michigan Court

(*concluded on page 7*)

Court of Appeals is inconsistent with this Court's decision in *City of Canton* v *Harris*,__ US __; 109 S. Ct. 1197; 103 L Ed 2d 412 (1989). In fact, however, the reversal of the jury verdict imposing liability against the City of Detroit under 42 USC § 1983 is wholly consistent with *City of Canton* v *Harris, supra*. Had the Michigan courts done otherwise, Respondent would have been justified in petitioning this Court for relief.

In *City of Canton*, this Court held "that there are limited circumstances in which an allegation of a 'failure to train' can be the basis for liability under § 1983." (109 S. Ct., at 1204) However, in delineating the circumstances where such a theory would be viable, the Court rejected, as "overly broad", the rule utilized by the Sixth Circuit Court of Appeals when it reviewed the jury verdict in *City of Canton*. (109 S. Ct., at 1204) The Sixth Circuit rule rejected by this Court was stated as follows:

> On appeal, the Sixth Circuit . . . [held] that "a municipality is liable for failure to train its police force, [where] the plaintiff . . . prove[s] that the municipality acted recklessly, intentionally, or with gross negligence." . . . The Court of Appeals also stated that an additional prerequisite of this theory of liability was that the Plaintiff must prove "that the lack of training was so reckless or grossly negligent that depriva-

---

(*continued from page 6*)

of Appeals, seeking a reversal of the judgment entered in favor of the individual police officers. The grounds advanced by Petitioners did not relate to the issues relevant to the City's liability under 42 USC § 1983. The Michigan Court of Appeals affirmed the judgment entered in favor of the police officers. Petitioners' subsequent application for leave to appeal to the Michigan Supreme Court also sought further review of two issues pertaining to the individual officers. Those issues have not been pursued in the pending petition.

> tions of persons' constitutional rights were substantially certain to result." . . .

(109 S. Ct., at 1201)

As noted above, this formulation of a standard of liability was rejected by the Supreme Court as "overly broad".[4] In its stead, the Court agreed with those Circuit Courts of appeal which had adopted a "deliberate indifference" standard:

> . . . We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. (footnote omitted) . . .

(109 S. Ct., at 1204)

The Court found that this standard of municipal fault was most consistent with its prior decisions in *Monell* v *New York City Department of Social Services*, 436 US 658; 98 S. Ct. 2018; 57 L Ed 2d 611 (1978) and *Polk County* v *Dodson*, 454 US 312; 102 S. Ct. 445; 70 L Ed 2d 509 (1981), explaining further:

> . . . Only where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under § 1983. As Justice BRENNAN's

---

[4] This "overly broad" standard was utilized by the Sixth Circuit in its review in *City of Canton* v *Harris*, as well as in its earlier decisions in *Hays* v *Jefferson County, Kentucky*, 668 F2d 869, 874 (6th Cir 1982), and *Rymer* v *Davis*, 754 F2d 198 (6th Cir 1984), vacated and remanded *sub nom, City of Shepherdsville, Kentucky* v *Rymer*, 473 US 901, 105 S.Ct. 3518, 87 L Ed 2d 646, reinstated, 775 F2d 756, 757 (6th Cir 1985). [See 109 S. Ct., at 1201, footnote 3.]

> opinion in *Pembauer* v *Cincinnati*, 475 US 469, 43-44, 106 S.Ct. 1292, 1300, 89 Law Ed 2d 452 (1986) (plurality) put it: "[M]unicipal liability under § 1983 attaches where — and only where — a deliberate choice to follow a course of action is made from among various alternatives" by city policymakers. See also, *Oklahoma City* v *Tuttle*, 471 US, at 823, 105 S.Ct., at 2436 (opinion of REHNQUIST, J.) Only where a failure to train reflects a "deliberate" or "conscious" choice by a municipality — "a policy" as defined by our prior cases — can a city be liable for such a failure under § 1983.

(109 S.Ct., at 1205)

In the case at bar, the jury imposed § 1983 liability on the City of Detroit in response to a special interrogatory drafted by Petitioners. A cursory reading of that question demonstrates that, if anything, it is even broader than the "overly broad" formulation rejected by the Supreme Court in *City of Canton:*

> Do you find that the City of Detroit failed to train its police force, or trained it in a reckless or grossly negligent manner, or was deliberately indifferent to training required,so that future police misconduct was almost inevitable, or do you find that there was a policy, custom, ordinance or procedure which violated Plaintiff MAJOR BOGGERTY's constitutional rights?

(Petitioners' Appendix, p. D4)

Petitioners focus on the fact that the phrase "deliberate indifference" appears in the standard submitted to the jury, ignoring the remainder of the question. It is apparently Petitioners' position that as long as the magic words "deliberate indifference" appear, the stan-

dard will pass muster.[5] This is clearly not the case, and Respondent would simply note the use of the word "or" three times: In other words, the jury in the case at bar was allowed to impose § 1983 liability on the City if it found that the City had failed to train its police force *or* if it found that the City of Detroit had trained its police force in a reckless or grossly negligent manner *or* if it found that the City of Detroit was deliberately indifferent to the training required by its police force so that future police misconduct was almost inevitable *or* if it found that there was a policy, custom, ordinance or procedure which violated Petitioners' constitutional rights.

On the basis of this question alone, the jury verdict was properly reversed and this petition should be denied. Not only is the result reached by the Michigan Court of Appeals correct, but this case presents no questions needing clarification or resolution by this Court.

II.

REGARDLESS OF THE STANDARD APPLIED, THE EVIDENCE IN THIS CASE WAS INSUFFICIENT TO ESTABLISH EITHER A CITY POLICY OF INADEQUATE TRAINING OR AN AFFIRMATIVE LINK CONNECTING SUCH POLICY TO A RELEVANT CONSTITUTIONAL DEPRIVATION.

As stated by this Court in *City of Canton* v *Harris, supra,* the "first inquiry in any case alleging municipal

---

[5] It is also noteworthy that Petitioners cite the Sixth Circuit opinion in *Rymer* v *Davis, supra,* as supportive of their position, noting at p. 31 of their brief: "It is essential to note that the jury instruction in the instant case contained every element of the *Rymer* instruction *plus* the 'deliberate indifference' language now required by *City of Canton.*" This statement alone demonstrates the Petitioners' misunderstanding of the *City of Canton* opinion. It also suffices to support both a reversal of the jury verdict in this case, as well as a denial of the pending petition.

liability under § 1983 is the question of whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation." (109 S. Ct., at 1203) The Michigan Court of Appeals correctly held that the evidence in this case was insufficient to establish either a city policy of inadequate training, or an affirmative link connecting such a policy to a constitutional deprivation. Moreover, no wrong of constitutional magnitude existed which could arguably have been linked to the alleged policy of inadequate training in the handling of intoxicated prisoners.

An understanding of three peculiarities of this case is central to an understanding of the case itself:

(a) Two inconsistent factual versions of the incident have variously been relied on by Petitioners in an attempt to sustain the jury's verdict: A sober man who is beaten by five police officers versus a drunk man who fell over a trash bin. In order to articulate the three elements necessary to § 1983 municipal liability (policy; causal connection; constitutional violation), Petitioners jump between these versions, never relying wholly on one. Neither story can support all three elements. Thus, for example, the version of an intoxicated man gives rise to a theory of inadequate training in the handling of intoxicated prisoners. However, this inadequacy cannot be affirmatively linked to an assault. If it is linked to the version of a fall, there is no arguable constitutional injury.

(b) Throughout the pre-trial, trial and post-trial proceedings, Respondent complained of the lack of specificity of Petitioners' § 1983 claim. Petitioners were repeatedly requested

to articulate the constitutional right implicated by Mr. Boggerty's injury, and the manner of its infringement. They never did so in the Courts below, and their petition to this Court is equally deficient. This deficiency continues to make discussion of the legal principles involved in this matter difficult.

(c) The jury verdict exonerated all of the police officers on all claims brought against them, including the claim for assault and battery. The Michigan Court of Appeals stated: "The special verdict makes clear that the jury premised the City's liability on the City's failure to properly train its doorman and the resultant negligent removal of Plaintiff from his cell." (Petitioners' Appendix, pp. A11-A12) In other words, the jury necessarily rejected the theory of assault.

With these factors in mind, the insufficiency of the record in this case becomes clear.

As noted by the Michigan Court of Appeals, in viewing the evidence in the light most favorable to Plaintiff, the testimony of Petitioners' experts failed to produce sufficient evidence of a policy of inadequate training.[6] As stated by this Court in *City of Canton*, 109 S. Ct., at 1205:

> Monell's rule that a city is not liable under § 1983 unless a municipal policy causes a constitutional deprivation will not be satisfied by merely alleging that the existing training program for a class of employees, such as police

---

[6] The evidence was insufficient to support municipal liability pursuant to either the broader standard submitted to the jury, or the narrower standard adopted in *City of Canton*.

> officers, represents a policy for which the City is responsible. [footnote omitted] That much may be true. The issue in a case like this one, however, is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent "city policy." . . .

Petitioners presented two experts, Frank Donley and Eric Beckman. Dr. Donley testified that the City's written program of training was good, but that it had not been effectively carried out. Dr. Beckman testified that the City's training program, and its implementation, met all state standards, although he felt that these requirements did not measure up to the standards which he believed should have been applied. The testimony of these witnesses also indicated their general lack of familiarity with the training actually received by Detroit police officers.[7]

Moreover, the source of the witness' knowledge of the training received by the Detroit police force was solely the deposition testimony of certain Defendant officers concerning their own training.[8] This is hardly sufficient to conclude that a policy of inadequate training exists, especially considering that the experts

---

[7] See, for example, Dr. Beckman's testimony that he became familiar with the Detroit training procedures "[b]y keeping abreast of the field, by having conversations with police officers of various ranks, some within the Detroit Police Department, some outside the Detroit Police Department, and feedback about different levels of training that exists in different police departments." [Petitioners' Appendix, p. E15]

[8] See, e.g., Petitioners' Appendix, pp. E1, E5, E7, E11, F1, F6, F9 and F13.

had no knowledge of the actual training received by these officers or any Detroit officers.[9]

Moreover, a conclusion that particular officers were inadequately trained cannot suffice to support a finding of a "policy" of inadequate training. As explained by this Court in *City of Canton* v *Harris*, 109 S. Ct., at 1205-1206:

> In resolving the issue of a city's liability, the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform. That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the City, for the officer's shortcomings may have resulted from factors other than a faulty training program. [citations omitted] It may be, for example, that an otherwise sound program has occasionally been negligently administered. Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or

---

[9] For example, during Dr. Beckman's testimony the following colloquy occurred:

> Q. Now listen to me, doctor: from 1970 to 1979, did the Detroit police academy that you visited once up on Cass Avenue, did it provide any training for doorman, whether Mr. Murray got it or not, did it provide training for doorman?
>
> A. I don't know.
>
> Q. You have no idea?
>
> A. I don't know.
>
> Q. Sir, how are you — you don't know if they offered any training during that period of time at all?
>
> A. For doorman, specifically?
>
> Q. Yes?
>
> A. No.
>
> [Tr VIII, pp. 138-139]

> more training, sufficient to equip him to avoid the particular injury-causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal. And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the City liable.
>
> Moreover, for liability to attach in this circumstance the identified deficiency in a City's training program must be closely related to the ultimate injury. Thus, in the case at hand, Respondent must still prove that the deficiency in training actually caused the police officers indifference to her medical needs. . . .[10]

In *City of Canton*, this Court reaffirmed the principle that, in order to establish a city policy, there must be some evidence of a deliberate choice, made by a city policymaker from among various alternatives. (109 S.Ct., at 1205) In the case at bar, Petitioners did not submit proof of a single action taken by a municipal policymaker. To the contrary, the *only* evidence of any action taken by a policymaker was the promulgation of a training program which both of Petitioners' experts testified was a good program.[11] Moreover, the record

---

[10] Thus, the adequacy or inadequacy of the training received by Officer Wilson and Defendant Coleman, referred to by Petitioners in support of their petition, are irrevelant to the present inquiry.

[11] Dr. Donley testified:

> Q. Do you have any opinion as to whether the City of Detroit's training program itself is improper?

(*concluded on page 16*)

contains no evidence of any other incidents or injuries allegedly caused by a policy of inadequate training.

Even if it were assumed that the record contained sufficient evidence of inadequate training, Petitioners are unable to affirmatively link this inadequacy to a relevant constitutional right. The only arguable constitutional violation depended on the Petitioners' theory of assault, a theory which was rejected by the jury. However, even had the jury accepted the existence of an assault, no affirmative link exists between a brutal assault and a policy of inadequate training in the handling of intoxicated prisoners.

The existence of a constitutional wrong is absolutely essential to the imposition of liability under 42 USC § 1983. *Baker* v *McCollan*, 443 US 137; 99 S. Ct 2689; 61 L Ed 2d 433 (1979); *Paul* v *Davis*, 424 US 693; 96 S. Ct. 1155; 47 L Ed 2d 405 (1976). *Even if* there was evidence of a city policy or custom of inadequate police training in the handling of intoxicated prisoners and *even if* such a policy of inadequate policy was affirma-

---

(*continued from page 15*)

A. Improper how, as written?

Q. Yes?

A. No, I think its a well-written program.

* * *

Q. And so the academy was doing the job in presenting this program; is that true? This is the program the academy presented?

A. If everyone of the detention officers or doorman, as we are characterizing them during this trial, were trained to that program, they were adequately trained.

[Tr VII, pp. 105, 167]

Dr. Beckman testified:

Q. And can you tell me how many hours of training they give to a police officer at the Detroit police academy?

A. The number provided by the state.

Q. They meet the standards in other words?

A. Yes, sir.

[Tr VII, p. 138]

tively linked to Plaintiff's injury resulting from his removal from a cell while in an intoxicated condition, the resulting injuries did not constitute a wrong of *constitutional* magnitude. No constitutional right was implicated.

For example, if a city refused to train its officers in proper search procedures and, as a result, a plaintiff was searched without probable cause and without a search warrant, the fourth amendment guarantees against unreasonable search and seizure would be implicated and a § 1983 violation would be possible. Similarly, if a city improperly trained its officers with regard to the rights of citizens to peacefully protest and, as a result, a citizen was prohibited from lawfully protesting, the first amendment guarantees of free speech and assembly would be implicated and a § 1983 violation would be possible.

However, unless one of a person's constitutional rights is infringed as a result of the inadequate training of a police department, no § 1983 liability may be imposed. In the case at bar, no § 1983 liability could be imposed against the City of Detroit because even if the Plaintiff suffered personal injury as a result of being removed from his cell while intoxicated, no *constitutional* deprivation occurred.

In sum, there was no constitutional deprivation resulting from a city policy or custom of inadequate training in the care and custody of intoxicated persons. Conversely, there was absolutely no evidence, sufficient or otherwise, of any other municipal policy or custom.

III.

PETITIONERS' PLEADINGS FAILED TO ALLEGE A POLICY OR CUSTOM OF THE CITY OF DETROIT WHICH WAS A DIRECT CAUSE OF A CONSTITUTIONAL DEPRIVATION AND THIS CASE SHOULD HAVE BEEN DISMISSED AT THE PLEADING STAGE.

Regardless of the record created at trial, this case should have been dismissed on Respondent's motion for summary judgment. The elements missing at trial were also missing from Petitioners' Complaint.

In its motion for summary judgment, the City argued that the Complaint did not adequately allege a policy or custom of the City of Detroit which was a direct cause of the deprivation of a constitutional right. It contended that the allegations were vague, conclusory, failed to give fair notice of the specific facts and theories of misconduct directed against the City, and failed to properly allege a denial of a constitutional right caused by a governmental policy or custom. The Complaint contained no factual averments to demonstrate a city policy of inadequate training, or how any such policy caused the alleged assault and violation of a specific constitutional right. As a result of the denial of this motion, a case proceeded to trial without the Defendants knowing precisely where Plaintiff was heading, and without the Plaintiff knowing precisely where he should be heading.

Summary disposition of cases serve a worthwhile purpose in our legal system. While potentially meritorious cases should proceed to trial, complaints, which on their face, fail to state a viable claim should be dismissed before the parties and the court incur the tremendous expense of trial. Given the liberal allowance of amendments, a party who has simply neglected to

include necessary allegations, or who has misperceived the applicable legal standards, may amend his complaint and proceed to trial. On the other hand, where no viable claims exists, litigation should end. A plaintiff who has a no claim, such as in the case at bar, should not be allowed to proceed to trial.

This is especially true in § 1983 cases brought against municipalities, which are very difficult to prove. Unless plaintiffs are required to specify their complaints, these claims are, however, very easy to allege. Trials without focus result. Serious consideration of motions for summary judgment can dispose of some cases. In others, and although the motion may be denied or the plaintiff given leave to amend, the parties may be apprised of the legal standards which will govern the trial. Plaintiffs can thereafter attempt to conform their proofs to the enunciated standards and defendants will be given a proper focus for their defense.

In the case at bar, the motion for summary judgment was brought over two years after suit was commenced, at a time when Petitioners should have been able to state the specific elements and factual allegations which would support their claim. They were not able to do so, *even after the trial was over.*

Petitioners knew the legal position of the City, which had not changed since the filing of the motion for summary judgment. In presenting their case to the jury, they chose to ignore the possibility that the City's position might be correct. Their Complaint was deficient, their proofs at trial were deficient.

IV.

PETITIONERS' THEORY OF MUNICIPAL LIABILITY PRESUPPOSED THAT PETITIONER'S TESTIMONY WAS FALSE CONCERNING FACTS WITHIN HIS OWN PERSONAL KNOWLEDGE.

As discussed above, Petitioners were allowed to rely on two wholly inconsistent factual positions throughout the trial proceedings.

On the one hand, Plaintiff testified that he had had nothing to drink for the eight or nine hours preceding his arrest; that there was no basis for an arrest relating to intoxicants or disturbing the peace, and that he was assaulted and battered by David Murray and other officers. Petitioners' testimony was always consistent in this regard, and he called several witnesses in support of his version of the fact of his sobriety and assault. Petitioner never waivered. He testified that he clearly remembered the incident and testified in detail as to the events of that day, including a specific description of David Murray as the principal assailant.

On the other hand, Plaintiff's counsel argued that if the jury believed that Plaintiff was, in fact, intoxicated (thus rendering the arrest indisputably legal and impeaching Plaintiff's entire testimony), then it should find that Plaintiff's injuries were sustained because the police officers did not know how to handle intoxicated persons. (Failure to adequately train officers in the handling of intoxicated persons is relevant only if Plaintiff *was* intoxicated.) Although there was evidence of intoxication, there was no *evidence* of how Plaintiff's injuries were sustained if it was not as the result of an assault and battery on a sober plaintiff. The only testimony offered at trial with regard to the crucial incident in the lock-up room was that of Plaintiff. There was no

testimony offered by Plaintiff, or anyone else, of any negligent handling of Plaintiff which resulted in his injuries.

It was on this latter theory that liability was imposed on the City of Detroit. However, it was error to have allowed Petitioner to have advanced this hypothetical theory of liability and the jury's verdict could properly have been set aside on this basis.

As a matter of public policy, the maintenance of these wholly inconsistent theories should not have been allowed or condoned. A claimant cannot testify as to his version of the facts and turn around and ask the jury to return a verdict in his favor based on the theory which presupposes that his testimony was perjured.[12]

CONCLUSION

A writ of certiorari should not issue to review the opinion of the Michigan Court of Appeals. That opinion is wholly consistent with this Court's decision in *City of Canton* v *Harris, supra,* the case upon which Petitioners rely in support of their position that further review is necessary. Moreover, the insufficiency of the

---

[12] Respondent recognizes that in many circumstances, a plaintiff is entitled to take alternative positions because he is not, himself, possessed with the true facts. Thus, it is permissible for a plaintiff to maintain different theories when he does not have possession of all the facts. Such alternate theories are also permissible when a plaintiff's perception of the facts is open to good faith error. However, in the case at bar, Petitioner was possessed of all relevant facts, and his good faith perception was not open to question. In order to succeed on his theory based on intoxication, the jury must have totally rejected Petitioners' primary theory of assault, as well as all of the facts which Petitioner had testified to. The theories proposed by Plaintiff were wholly inconsistent with each other, and the theory of intoxication, the only one submitted to the jury with regard to the City's liability, was completely at odds with Petitioners' testimony of the facts.

record to support the jury's imposition of § 1983 liability upon the City of Detroit is manifest.

Respectfully submitted,

GARAN, LUCOW, MILLER,
SEWARD, COOPER & BECKER, P.C.

By: /s/ MATTHEW A. SEWARD
/s/ ROSALIND ROCHKIND
Counsel of Record

Attorneys for Respondent
City of Detroit
1000 Woodbridge Place
Detroit, MI 48207-3192
(313) 446-5503

Dated: September 22, 1989